Supreme Court, U.S.
FILED
94 2135 JUN 28 1995
OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CITY OF MORGAN CITY,
Petitioner,

v.

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, CAJUN ELECTRIC POWER COOPERATIVE, INC., and THE UNITED STATES OF AMERICA, through the RURAL UTILITIES SERVICE,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

WALLACE E. BRAND
Suite 1000
1730 K Street, N.W.
Washington, D.C. 20006
(202) 347-7002

CLIFTON S. ELGARTEN *
AMY J. MAUSER
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2500
Attorneys for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

11 See

QUESTIONS PRESENTED

1. Is a municipality barred by the doctrine of "frustration of federal purpose" from exercising its power of eminent domain to condemn the property of a utility that has received federal loans under the Rural Electrification Act, 7 U.S.C. §§ 901, *et seq.*?

2. Does Section 7 of the Rural Electrification Act, 7 U.S.C. § 907, require the approval of the Act's Administrator before a local government may exercise its power of eminent domain to take property belonging to a utility that has received an REAct loan?

PARTIES TO THE PROCEEDING BELOW

All parties to the proceeding below are named in the caption. The United States appeared below through the Rural Electrification Administration, an agency within the United States Department of Agriculture charged through its Administrator with responsibility for the Rural Electrification Act. As part of its reorganization of the Department of Agriculture, Congress has created a new federal agency within the Department, the Rural Utilities Service, and assigned to its Administrator the administration of the Rural Electrification Act. The caption of this Petition reflects that change.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
Overview	3
The Parties To This Action	5
The Rural Electrification Act	6
Administrative Action Relied Upon By The District Court	7
The District Court Decision	7
The Court Of Appeals Decisions	8
REASONS FOR ISSUING THE WRIT	11
I. THE DECISION OF THE COURT BELOW FRUSTRATES STATE POLICY, CONFLICTS WITH STATE COURT DECISIONS, AND IMPEDES THE GROWTH OF MUNICIPALITIES PROVIDING PUBLIC POWER TO THEIR CITIZENS	11
II. THE DECISION OF THE COURT OF APPEALS IS INCONSISTENT WITH THIS COURT'S PREEMPTION DECISIONS	15
III. THE DECISION BELOW IS NOT SUSTAINABLE ON THE STATUTORY GROUND EMPLOYED BY THE DISTRICT COURT	24
CONCLUSION	25

TABLE OF AUTHORITIES

Cases: Page

Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375 (1983) ..... *passim*

BFP v. Resolution Trust Corp., 114 S. Ct. 1757 (1994) 16-17

Brotherhood of Locomotive Engineers v. Chicago, Rock Island & Pacific Railroad Co., 382 U.S. 423 (1966) 22

Cipollone v. Liggett Group, Inc., 505 U.S. ——, 112 S. Ct. 2608 (1992) 17

City of Madison v. Bear Creek Water Ass'n, Inc., 816 F.2d 1057 (5th Cir. 1987) 9

City of Rochester v. Peoples Co-op Power Ass'n, Inc., 505 N.W.2d 621 (Minn. App. 1993) 15, 24, 25

City of Stilwell v. Ozarks Rural Elec. Coop. Corp., 870 F. Supp. 1025 (E.D. Okla. 1994) 14

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 16, 22

CSX Transp., Inc. v. Easterwood, 113 S. Ct. 1732 (1993) 17

CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987) 16, 22

Decatur County Rural Elec. Membership Corp. v. Public Serv. Co., 261 Ind. 128, 301 N.E.2d 191 (1973) 14

English v. General Elec. Co., 496 U.S. 72 (1990) 16

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) 16, 22

Felder v. Casey, 487 U.S. 136 (1988) 23

Freightliner Corp. v. Myrick, 63 U.S.L.W. 4265 (April 18, 1995) 22

Hines v. Davidowitz, 312 U.S. 52 (1941) 16

Gade v. National Solid Wastes Management Ass'n, 505 U.S. ——, 112 S. Ct. 2374 (1992) 22

International Paper Co. v. Ouellette, 479 U.S. 481 (1987) 22

Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959) 18

Maryland v. Louisiana, 451 U.S. 725 (1981) 17

TABLE OF AUTHORITIES—Continued

	Page
Michigan Canners & Freezers Ass'n, Inc. v. Agriculture Marketing and Bargaining Bd., 467 U.S. 461 (1984)	22
New York Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 63 U.S.L.W. 4372 (April 26, 1995)	18
Northwest Centr. Pipeline Corp. v. State Corp. Comm'n of Kansas, 489 U.S. 493 (1989)	20
Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983)	17, 18, 22
Public Utility Dist. No. 1 of Franklin County v. Big Bend Elec. Coop., Inc., 618 F.2d 601 (9th Cir. 1980)	12
Public Utility Dist. No. 1 of Pend Oreille County v. United States, 417 F.2d 200 (9th Cir. 1969)	8-9, 12, 13
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)	18
Rodriguez v. United States, 480 U.S. 522 (1987)	15
United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979)	20, 21
Wabash Valley Power Ass'n, Inc. v. REA, 903 F.2d 445 (7th Cir. 1990)	20
West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83 (1991)	15, 19
Xerox Corp. v. County of Harris, 459 U.S. 145 (1982)	23
Statutes:	
5 U.S.C. § 702	8
5 U.S.C. § 706(2)(A)	8
5 U.S.C. § 706(2)(B)	8
7 U.S.C. § 901	6
7 U.S.C. § 902	7
7 U.S.C. § 907	*passim*
7 U.S.C. § 912	7
7 U.S.C. § 912a	7
7 U.S.C. § 913	6

TABLE OF AUTHORITIES—Continued

	Page
7 U.S.C. § 1926(b)	9, 19
7 U.S.C. § 6942	6
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1444	6
28 U.S.C. § 2410(a) (4)	6
Louisiana Revised Statutes §§ 19:101 *et seq.*	6
Constitutional Provisions:	
U.S. Const. art. VI, cl. 2 (Supremacy Clause)	2
Regulations:	
7 C.F.R. § 1710.112(b) (5) (1995)	20
Legislative Materials:	
80 Cong. Rec. 2168	24
Hearings on S. 34-83 Before the House Committee on Interstate and Foreign Commerce, 74th Cong., 2nd Sess. 74 (1936)	24
Other Authorities:	
The Law of Preemption, a Report of the Appellate Judges Conference, American Bar Association (1991)	10-11, 23
National Rural Electric Cooperative Association, *Management Issues Facing Rural Electric Systems: Recent Developments and Implications* (1993)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No.

CITY OF MORGAN CITY,

Petitioner,

v.

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, CAJUN ELECTRIC POWER COOPERATIVE, INC., and THE UNITED STATES OF AMERICA, through the RURAL UTILITIES SERVICE,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner City of Morgan City respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit dated September 12, 1994, as supplemented by an opinion on rehearing dated April 3, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit dated September 12, 1994, is reported at 31 F.3d 319, and is set forth in the Appendix at 1a. The April 3, 1995 decision on rehearing is reported at 49 F.3d 1074 and is set forth at App. 24a. The opinion of Judges Jones, Smith, and DeMoss, dissenting from denial of rehearing en banc, is reported at 49 F.3d at

1076, and is set forth at App. 28a. The opinion of the United States District Court for the Western District of Louisiana is reported at 837 F. Supp. 194 and is set forth at App. 12a. A decision of the Rural Electrification Administration relied upon by the district court and cited by the Court of Appeals is set forth at App. 35a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on September 12, 1994. The petition for rehearing was denied on April 3, 1995. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Rural Electrification Act, 7 U.S.C. §§ 901 *et seq.*, are set forth at App. 76a, including 7 U.S.C. § 907, which is set forth at App. 76a-77a. The text of the Supremacy Clause, United States Constitution, art. VI, cl. 2, is set forth at App. 82a.

STATEMENT

Relying on "frustration of federal purpose," the court below held that by virtue of having obtained a federal loan under the Rural Electrification Act ("REAct") a utility providing service to customers within a municipality is immune from the municipality's exercise of its power of eminent domain. This "breathtaking federal power-grab" (49 F.3d at 1076; App. 28a) curtails the natural expansion of many cities that provide public power to their citizens and nullifies state laws and policies that afford municipalities the exclusive right to provide electric service to their citizens. The expansive vision of "frustration" on which the decision rests is in direct conflict with decisions of the state courts dealing with precisely this issue, is inconsistent with this Court's restrained approach to claims of implied preemption in areas of traditional state authority, and takes the "frustration" doctrine far from its constitutional roots.

Overview

It is the historic province of the states to regulate utilities and determine the areas in which utilities may operate within the state. Exercising that traditional power, most states afford municipalities in the state the right to be the exclusive providers of electric power to their citizens. In aid of that exclusive right, municipalities are granted the power of eminent domain; specifically, the power to take, upon payment of just compensation, the franchise and property of other utilities that previously operated within the municipality's boundaries. Consistent with these state policies, more than 2,000 towns and cities now provide electric power to their citizens. At any given time, many additional towns and cities are considering doing so.

As towns and cities develop, and the surrounding area becomes more densely populated (*i.e.*, less rural), the town or city will expectably seek to expand into adjacent suburban areas that are part of the larger urban community. Following annexation, towns and cities that provide electric service will exercise their right under state law to provide electricity to the citizens of the newly annexed areas. Along with other considerations addressed by elected officials in determining whether annexation is in the community's best interest, the opportunity to provide utility service to the new area is often an important economic factor in the decision to annex.

Revenue from the sale of municipal power often helps to finance other municipal services—such as street lights, sewers, and police and fire protection for existing areas or newly annexed areas. The lower price of municipal power often provides a correspondingly important reason why the citizens of adjacent areas seek to be annexed.[1]

[1] In addition, many municipalities are presently considering initiating municipal electric service because (1) they can provide their citizens lower price electric service through municipal power,

In addition, following annexation, those citizens will receive additional municipal benefits, often underwritten in part by municipal power. On the other hand, the current providers of electric service to the areas surrounding the urban center have a natural tendency to resist encroachment on their customer base.

Electric service to these surrounding areas is often provided by "rural electric cooperatives." [2] These cooperatives are typically beneficiaries of federal loans made available under the REAct—a federal program of low cost loans designed to encourage rural electrification. 31 F.3d at 322; App. 6a. Although the areas in question are no longer "rural," the rural utilities prize their service to those areas for that very reason. Their higher population density makes them more profitable to serve.[3] 31 F.3d at 324; App. 10a. In effect, REA borrowers use urban customers to subsidize rural customers, making it easier to repay loans or increase profits.

The clash of interests described above recurs frequently, for municipal annexation and expropriation are

---

and (2) significant municipal revenue can be generated by the sale of electricity.

[2] Such cooperatives serve over 70% of the geographical land mass of this country. National Rural Electric Cooperative Association, *Management Issues Facing Rural Electric Systems: Recent Developments and Implications* 1 (1993).

[3] As the National Rural Electric Cooperative Association described the cooperative's economic interests in an *amicus* brief filed in support of the United States in the court below:

> [A]ttractive loads . . . are often in the higher density areas close to municipalities. Because of the profitability of serving areas, they become targets of municipal annexation and condemnation. Loss to municipalities of the right to service these territories makes it impossible for rural electric systems to realize the economics of scale and lower per-user costs that accompany service to higher density areas . . . .

Brief of Amicus Curiae National Rural Electric Cooperative Association in Support of the United States of America (October 5, 1993) at 12.

the product of natural demographic changes as people seek to avail themselves of the benefits of living near or within an urban center. A survey by the National Rural Electric Cooperative Association, reported to the court below, showed that at least 86 of its member cooperatives lost customers through municipal condemnations (resulting in the payment of approximately $80 million in compensation) in the period 1985-89.[4]

The decision of the court of appeals effectively barring municipal expropriation of the property of REA borrowers hems in many of the more than one hundred municipalities within the Fifth Circuit providing municipal power, affecting their annexation plans and their budgets. A similar bar applies in the Ninth Circuit.

The Parties To This Action

Petitioner City of Morgan City is a Louisiana municipality that has long provided electricity to its citizens. It has a total population of 17,000 and its utility serves about 6,000 customers. In January 1985, Morgan City annexed a small adjacent suburban area. In addition to affording the residents of the annexed area the right to take advantage of city services and participate in its political processes, Morgan City wishes to provide those citizens with the same low cost electric service that it affords its other citizens.

Respondent South Louisiana Electric Cooperative Association ("SLECA") is an electric cooperative that has received long-term, low-interest loans from the REA, secured by a general lien on SLECA's property and

---

[4] *See* Final Report of the Territorial Integrity Committee, National Rural Electric Cooperative Association, November 1990, Appendix A, Annual Annexation Losses for RECS Responding to Annexation Survey (attached to the *amicus* brief of the NRECA in the court below). It appears that all of those condemnations would be barred by the rule established by the court below.

income.[5] Approximately 252 of SLECA's 14,828 customers are located in the area annexed by Morgan City.

On August 3, 1990, Morgan City brought this action pursuant to L.R.S. §§ 19:101 *et seq.* in Louisiana state court to expropriate certain SLECA property—including the exclusive right to serve the utility customers within the annexed area. On January 11, 1991, Respondent Cajun Electric Power Cooperative, Inc. ("Cajun"), a rural electric generation and transmission cooperative that provides power to SLECA, intervened.[6] Because of its security interest in SLECA's property, Respondent United States (through the REA) was joined as a third party defendant under 28 U.S.C. § 2410(a)(4). Section 2410 provides that the interests of a federal lienholder may be terminated according to the state law standards that govern the termination of a private lienholder's interests. Pursuant to 28 U.S.C. § 1444, the United States removed the case to the United States District Court for the Western District of Louisiana.

The Rural Electrification Act

The Rural Electrification Act ("REAct"), 7 U.S.C. §§ 901 *et seq.*, establishes a loan and guarantee program to assist electric utilities in financing service to rural areas. "Rural areas" are areas "*not* included within the boundaries of any urban area." *Id.* at § 913 (App. 80a). During the relevant time frame, the loan program was administered by the REA; pursuant to a recent internal reorganization of the Department of Agriculture, it is now administered by the Rural Utility Service. 7 U.S.C. § 6942.

---

[5] SLECA owes approximately $25 million to the REA. 31 F.3d at 321 n.1; App. 2a.

[6] Cajun has received substantial REAct loans. Cajun provides power, through distribution cooperatives like SLECA, to approximately 337,000 customers. App. 41a. The 252 SLECA customers located in Morgan City are less than one tenth of one percent of the total population indirectly served by Cajun.

The REAct grants the agency no regulatory authority. *See Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n,* 461 U.S. 375, 385-89 (1983). The REAct provides the Administrator with authority over its borrowers, which borrow on the terms and conditions established by the REAct and the Administrator. The Administrator's powers are like those of a banker, deciding whether to extend credit and control ongoing relations with borrowers. *See* 7 U.S.C. §§ 902, 912, 912a (App. 76a-80a).

Administrative Action Relied Upon By The District Court

Relying on 7 U.S.C. § 907 (App. 76a), which prohibits borrowers from disposing of loan security, the REA has taken the position that it has the statutory power to veto a municipality's condemnation of the property of an REA borrower. SLECA asked the REA to exercise this claimed power to allow it to "retain the consumers Morgan City proposes to expropriate." App. 48a. In support of that effort, Cajun and SLECA made submissions to the REA staff. Morgan City—whose action was at issue—had not borrowed REA funds; it was, therefore, not subject to the REA's authority and was not involved in the administrative process purporting to pass on its action.

After hearing from Cajun and SLECA, REA *dis*approved Morgan City's expropriation of SLECA's property, noting, *inter alia,* that "the Morgan City expropriation should not be considered an isolated taking [because] if successful, it could mark the beginning of several actions by Morgan City and other municipalities to acquire property and territorial service right[s] of SLECA and other REA borrowers in Louisiana." App. 74a.

The District Court Decision

On the basis of this administrative determination, Respondents moved for summary judgment. They argued that because Section 907 required prior REA approval,

and approval was denied, the expropriation could not go forward. Under this view, the only issue for the court was whether the decision to deny approval was arbitrary or capricious. Morgan City opposed the motion, arguing, *inter alia*, that § 907 simply did not grant REA the authority to approve or disapprove its expropriation.

The district court granted Respondents' motion, holding that the agency record adequately supported REA's action. 837 F. Supp. at 199-200; App. 20a-21a. It declined to consider evidence tendered by Morgan City.[7]

The Court Of Appeals Decisions

The Fifth Circuit panel did not address the district court's ground for decision, leaving the statutory question —whether Section 907 provides the REA with authority to disapprove a municipal condemnation of a borrower's property—"for another day." The panel adopted instead the broader constitutional ground that the state-law expropriation is preempted because it "would frustrate a federal purpose." 31 F.3d at 322; App. 5a.[8]

The Fifth Circuit panel largely adopted the reasoning of the Ninth Circuit in *Public Utility Dist. No. 1 of Pend*

---

[7] Morgan City tendered evidence to show that in light of the compensation that would be paid, and the schedule of future condemnations, the effect on SLECA was minor. Viewing the matter as involving review of the agency record, the district court rejected the evidentiary submission. On the same reasoning—and notwithstanding that Morgan City had not participated in the agency proceeding—the district court declined to allow Morgan City to conduct discovery. 837 F. Supp. at 195; App. 14a. In addition, the district court rejected Morgan City's contentions that because no approval authority was conferred by the REAct or by regulation, the agency decision was not "agency action" under 5 U.S.C. § 702, and, in any event, the applicable standard of review was that provided by 5 U.S.C. § 706(2)(B) rather than the "arbitrary and capricious" standard of 5 U.S.C. § 706(2)(A).

[8] The broader constitutional issue upon which the panel based its decision had *not* been raised in the district court. Following oral argument, the panel requested letter briefs on the "frustration" theory suggested by the Ninth Circuit cases.

Oreille County v. United States, 417 F.2d 200, 201-02 (9th Cir. 1969), holding that "[t]he condemnation of a portion of a federally subsidized rural electrification system, even if compensated for under state law, would impair Congress's objective of providing reliable, low-cost electricity to rural America." 31 F.3d at 323; App. 8a.[9] The panel noted that this expropriation "would pave the way for piecemeal erosion of other high-density service areas adjacent to Morgan City and other cities." Thus, the proposed expropriation would " 'stand as an obstacle' to the repayment of federal loans, to the financial viability of federally financed electricity cooperatives, and ultimately to the maintenance of electricity service to rural areas." *Id.* at 324; App. 10a.[10]

In denying rehearing, the panel addressed *Arkansas Electric*, 461 U.S. 375, which it had failed to mention in its earlier opinion. On rehearing, the panel discerned a "general federal policy of protecting the integrity of the REA's security interests." 49 F.3d at 1075; App. 26a. The panel again emphasized the likelihood of future expansion activities by Morgan City and other cities. It also made reference to REA "findings," noting the lost revenue and operating margins that would result from the proposed expropriation.

---

[9] The panel also cited an earlier Fifth Circuit decision, *City of Madison v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057 (5th Cir. 1987), which addressed a statute that *expressly* prohibited annexation of a water association's territory. 7 U.S.C. § 1926(b).

[10] As noted above, Respondents had not made an independent evidentiary submission in the district court of the kind that would support a *de novo* judicial ruling on "frustration." Rather, the REA proceeded as if this was an action to review an agency's exercise of its statutory power, presenting the administrative decision for APA review. *See* 837 F. Supp. at 199; App. 21a. In reaching the constitutional issue, the panel nonetheless adverted generally to administrative findings arising from the essentially "friendly" agency proceeding in which Cajun and SLECA had submitted materials to the agency, but Morgan City did not participate.

Dissenting from denial of rehearing *en banc*, Circuit Judge Edith H. Jones, writing for herself and Judges Jerry E. Smith and DeMoss, described the panel decision as having approved "a breathtaking federal power-grab by REA from local government units that otherwise enjoy broad eminent domain authority." 49 F.3d at 1076; App. 28a. The dissenters noted that neither the REAct itself nor the agency's regulations contemplate preemption of this "quintessential local power"; in fact, by requiring the REA to consider the risks "of loss of borrower's service territory from annexation" in assessing the feasibility of the loan, the REA's own regulations assumed that such annexations are *not* preempted.

The dissenting judges viewed the panel's decision as inconsistent with *Arkansas Electric*, 461 U.S. 375, which rejected an REA claim that state regulation of an REA borrower's rates would "frustrate" federal objectives. Noting that state rate regulation has far greater potential to hobble an REA borrower than does eminent domain, the dissenters found *Arkansas Electric* controlling. *Id.* at 1076-77; App. 28a.

The dissenters noted that § 907 (upon which the district court rested) merely "permits REA, like any lender, to prevent voluntary alienation of its collateral by the borrower; it says nothing about REA's ability to forestall *involuntary* condemnation of service territory." 49 F.3d at 1077; App. 31a (emphasis in original). The dissenting judges emphasized the breadth of the panel's decision, based on factual assumptions drawn from the REA record, without benefit of "hearing or trial," noting that if this condemnation, involving 252 customers, frustrates the REAct, it would be hard to imagine "what exercise of eminent domain would not do so." *Id.* at 1078; App. 32a.

Finally, the dissent commented on the "high degree of judicial policymaking" associated with the "frustration doctrine," *id.* at 1079; App. 34a (quoting *The Law of*

Preemption, a Report of the Appellate Judges Conference, American Bar Association 38 (1991) (authored by Judges Higginbotham, Seymour, Sneed, Starr, Clark, and Criswell)), and summarized the doctrine as "highly problematic, rarely utilized by the Supreme Court and of dubious propriety."

REASONS FOR ISSUING THE WRIT

I. THE DECISION OF THE COURT BELOW FRUSTRATES STATE POLICY, CONFLICTS WITH STATE COURT DECISIONS, AND IMPEDES THE GROWTH OF MUNICIPALITIES PROVIDING PUBLIC POWER TO THEIR CITIZENS

The court of appeals' decision bars municipalities from exercising the power, upon the payment of just compensation, to expropriate the property of utilities operating within their boundaries. The basis for this preemption is the utilities' receipt of, and continuing obligation under, federal loans.

The court of appeals proceeded on the economic understanding that the customers in the annexed area at issue—now citizens of Morgan City—were profitable to serve because they no longer lived in a rural area. If Morgan City exercised its state law prerogative to provide these citizens with municipal electric service, SLECA would lose an urban source of revenue, potentially affecting charges to its rural customers or making it more difficult for SLECA to repay its loans. The panel ignored the fact that SLECA would be compensated for the taking of its franchise based in part on the value of the lost revenue.

Apart from the broader precedential implications of finding receipt of federal loan money to be a source of immunity from state law,[11] the panel's decision has an immediate and lasting impact on cities providing munici-

[11] That rationale could create immunity from any number of state laws that make it harder for an REA borrower to repay its loans, *e.g.*, tax, environmental, or labor laws.

pal power within the Fifth Circuit—a circuit that includes many of the 2,000 municipalities in the Nation providing public power to their citizens. The impact of the decision falls not only on the scope of electric service provided by municipalities but also upon basic municipal planning and expansion decisions. In exchange for providing water, sewer, public lighting, or even police and fire service to a group of new citizens, a municipality may count on revenue generated by providing electric power to a newly annexed area.

The situation presented here recurs frequently,[12] as cities providing public power expand into contiguous areas served by cooperatives, or consider initiating municipal electric service to their citizens. In order to provide such service, municipalities must exercise their power of eminent domain. It is entirely reasonable for the state to afford municipalities the power to exercise eminent domain power in these circumstances. It is equally reasonable for the state to choose a public policy under which citizens who receive valuable municipal benefits are asked to share the burden of generating revenue for the city through the purchase of electric power from the municipal utility.

To be sure, the Ninth Circuit decisions cited by the court below had established a substantial barrier to expropriation of cooperative territory in that Circuit.[13] While ill-conceived, the Ninth Circuit's rule was of somewhat limited *practical* effect, in part because there are few municipal utilities within that Circuit abutting areas

---

[12] *See* text at n.1 *supra*. Indeed, the agency referred to the likelihood of future annexations by other municipalities. App. 63a; 74a.

[13] *Public Utility Dist. No. 1 of Franklin County v. Big Bend Elec. Coop., Inc.*, 618 F.2d 601 (9th Cir. 1980), and *Pend Oreille, supra*, 417 F.2d 200.

served by REAct borrowers.[14] The Fifth Circuit's ruling represents a far greater intrusion, affecting many municipalities.

The decision effectively creates a constitutional barrier to municipal expropriation of cooperative property. It states a general rule of preemption, not some narrow fact-bound exception. As the dissenters pointed out below, if preemption was warranted on these facts, involving an expropriation of 252 customers, it is difficult to conceive a permissible expropriation. 49 F.3d at 1078; App. 32a. Nothing in the panel decision reflected close attention to the facts of the particular expropriation. The panel's language (and its two quotations from the Ninth Circuit's *Pend Oreille* decision) took the form of broad statements to the effect that the taking of the cooperative's profitable customers presented a facial affront to federal objectives. 31 F.3d at 323; App. 9a-10a. The panel's only discussion of the facts was in rejecting the argument that the expropriation of 252 customers was *de minimis*. This was rejected based on the generality that even a small taking "could well leave federally funded cooperatives financially unable to continue service to the remaining low-density areas . . . ." 31 F.3d at 324; App. 10a.

Neither is the breadth of the panel's opinion obscured by the references on rehearing to gross revenues and system operating margins in the annexed territory. It is in the very nature of the demographic situation presented by municipal expropriation that the customers at issue provide "high operating margins" to a rural cooperative because they are in a densely populated area, whereas

---

[14] The condemnations at issue in the Ninth Circuit cases were by public utility districts, which have fixed, permanent boundaries. The actions of the public utility district might therefore have been characterized as selecting those customers within its boundaries that were most profitable to serve. The Ninth Circuit cases did not squarely address the natural demographic processes that give rise to municipal annexation and expropriation.

the remainder of its customers are presumably in rural (*i.e.*, low density, low operating margin) areas.[15] Thus, such takings will always involve the loss of the cooperative's most profitable customers. Even if it could be argued that there are cases involving takings more *de minimis* than this one, and that some cases will turn on particular facts, the mere possibility that a federal court might ultimately decide to approve the expropriation does not provide the assurance that a city needs in deciding whether to go forward with a possible annexation.

Indeed, the breadth of the Fifth Circuit's decision is reflected in a recent Oklahoma district court case following its reasoning. *See City of Stilwell v. Ozarks Rural Elec. Coop. Corp.*, 870 F. Supp. 1025, 1030 (E.D. Okla. 1994) (condemnation of 154 customers of an REA borrower "frustrate[d] the federal purpose," even though the REA did not "disapprove" it). Thus, this case is of lasting importance to cities within and without the Fifth (and Ninth) Circuits, whether they are providing municipal power now, or merely considering doing so.

The state courts have squarely rejected the REA's "frustration" theory. The Supreme Court of Indiana held that a municipality's condemnation of an REA borrower's service territory in an annexed area did not frustrate the REAct's purpose. *Decatur County Rural Elec. Membership Corp. v. Public Serv. Co.*, 261 Ind. 128, 301 N.E.2d 191, 198 (1973). The court was "unable to discern any clash between the State of Indiana and the United States" because "the purpose for [a rural cooperative's] existence expires when the area which it serves becomes 'urbanized.' " 301 N.E.2d at 198. Similarly, the Minnesota Court of

---

[15] Moreover, the panel's general references to REA "findings" only compounds the problem. 49 F.3d at 1076; App. 27a. If based on facts at all, the court of appeals' ruling was based on constitutional fact-finding, which was for the federal court to find based on the evidence before it. It is up to the agency, seeking to hold the state action unconstitutional, to prove its case. In this constitutional setting, the agency's position is addressed *de novo*; it is not subject to the deferential "arbitrary and capricious" standard.

Appeals, in rejecting the REA's "frustration" argument, expressly declined to follow the reasoning of the Ninth Circuit cases and the decision of the district court in this case, finding "more persuasive the views stated by the Supreme Court in *Arkansas Elec. Coop. . . .*" *City of Rochester v. Peoples Co-op Power Ass'n, Inc.*, 505 N.W.2d 621, 625-26 (Minn. App. 1993). The conflict between the state courts and the federal circuits on this issue is manifest.

II. THE DECISION OF THE COURT OF APPEALS IS INCONSISTENT WITH THIS COURT'S PREEMPTION DECISIONS

1. It is one thing to say (as the Supremacy Clause, art. VI, cl. 2, makes clear) that federal *law* trumps state law. It is far more problematic to say that federal courts are empowered to identify abstract federal "objectives" and then employ those federal objectives to override state law. Unless *Congress* has decided the issue presented, whether directly or by fair implication, a federal court oversteps both its judicial role and the limits of federal power when it nullifies state law armed only with its assumptions about the scope of federal "objectives."

Defining the *limits* of a federal program is just as much a policy choice committed to Congress as is conceiving the program in the first instance. "[T]he purpose of a statute includes not only what it sets out to change, *but also what it resolves to leave alone*. The best evidence of that purpose is the statutory text . . . ." *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991) (emphasis added).[16] Thus, to hold that a federal objective overrides state policies supporting the right of

---

[16] "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (emphasis in original).

municipalities to expropriate property in order to provide electricity to their residents, is itself to make an important policy choice.

This Court's cases establish a *constitutional* presumption that Congress intended to leave traditional exercises of state and local authority undisturbed. *See infra* at 17-18. To assume, as did the court below, that Congress would have chosen to override state and local authority to further the general objective of a federal program turns that constitutional presumption on its head.

Building on the Ninth Circuit cases, the Fifth Circuit gave a literal reading to the language from *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), that state law standing "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is preempted. It applied that language as if it were an invitation to the federal courts to nullify local law impeding the *general* goals of federal programs. In so doing, the court extended the "frustration doctrine" far beyond its constitutional premises. It cannot be enough under the Constitution that state law impedes some general federal goal. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133-34 (1978). There must be evidence that Congress actually made—either expressly, or at least impliedly—the specific policy judgment that the court seeks to enforce.[17]

---

[17] *See generally Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981) ("'[P]re-emption of state law by federal statute or regulation is not favored in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained'"); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 79, 86 (1987) (finding no preemption based on the frustration doctrine where a state law was "consistent with the text and purposes of" the federal law at issue); *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). *See also BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757, 1764 (1994) ("Federal statutes impinging upon important state interests 'cannot . . . be construed without regard to the implications of our dual system of government'"); *id.* at

In fact, in a related context, this Court cautioned against the very error that the panel made here: mistaking a federal program's overall goal for an intention to achieve that goal "at all costs." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 222 (1983). In *Pacific Gas*, the purpose of the statute in question "was . . . the promotion of nuclear power." *Id.* at 221. The Court nonetheless rejected the argument that state law impeding that objective frustrated the "full purposes and objectives of Congress":

> The Court of Appeals is right, however, that the promotion of nuclear power is not to be accomplished "at all costs." . . . [T]he legal reality remains that Congress has left sufficient authority to the States to allow the development of nuclear power to be slowed or even stopped for economic reasons. Given this statutory scheme, it is for Congress to rethink the division of regulatory authority in light of its possible exercise by the States to undercut a federal objective. The courts should not assume the role which our system assigns to Congress.

Id. at 222-23 (emphasis added). Here too, Congress left in place traditional state authority over utilities, including REA borrowers.

2. The court of appeals panel literally ignored this Court's repeated admonitions that any preemption inquiry must begin with the "assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). This "strong presumption against pre-emption" (*Cipollone v. Liggett Group, Inc.*, 505 U.S. ——, 112 S. Ct. 2608, 2621 (1992)) avoids "unintended encroachment on the authority of the States." *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1737 (1993). The rule against preemption is strongest where

---

1765-66 ("where the intent to override is doubtful, our federal system demands deference to long established traditions of state regulation").

the matter involves "a field which the States have traditionally occupied." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). "Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation [the Court has] worked on the 'assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress.' " *New York Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 63 U.S.L.W. 4372, 4374 (April 26, 1995) (citations omitted). The decision of the Fifth Circuit panel fails even to pay lip service to that presumption and the principles on which it is based.

Utility regulation is "one of the most important of the functions traditionally associated with the police power of the States." *Arkansas Electric*, 461 U.S. at 377. Because it is a " 'field which the states have traditionally occupied . . . we start with the assumption that the historic police powers of the states were not to be superseded . . . unless that was the clear and manifest purpose of Congress.' " *Pacific Gas & Elec. Co.*, 461 U.S. at 206 (citation omitted).

The expropriation at issue in this case, however, involves matters even more fundamental than utility regulation. With respect to the same Louisiana statute authorizing the expropriation here, this Court remarked on the "special nature of eminent domain" and its intimate connection "with sovereign prerogative." *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28-29 (1959). Equally fundamental to sovereignty is the power of a local government to define its political boundaries. There is no indication that Congress sought to interfere with the core political decisions associated with annexation, or the traditional assumption that a municipality with state approval may expropriate property in order to provide economical electric service to its citizens. Finally, nothing in the REAct suggests that Congress regarded the "just compensation" given other citizens

when their property is taken to be insufficient for REA borrowers.

Absent evidence that *Congress* has effectively made the policy choice at issue, a federal court should have *no* authority to impose its own notion of federal policy under the guise of a constitutional rule.

3. Congress could have given REA borrowers immunity from state laws impairing their ability to repay their loans, or allowed the agency to do so. Congress could have given the REA the power to assign service areas to borrowers; instead it left this area of traditional state authority untouched. Congress also could have *expressly* limited the power of municipalities to annex territory of an REA borrower, as it has done under *other* lending programs. *E.g.*, 7 U.S.C. § 1926(b) (water association's service area "shall not be curtailed or limited by the inclusion of the area served by such association within the boundaries of any municipal corporation"). But Congress did none of this expressly, and the court below suggested no reason to believe that Congress sought implicitly to displace the historic prerogative of cities to provide electric service to their citizens or otherwise interfere with state control over utility service areas. These are areas that Congress "left alone." *West Virginia Univ. Hosps.*, 499 U.S. at 98.

4. The panel below offered no reason to believe that the federal purposes that it found preemptive were *actually* congressional purposes. For example, it cited no evidence that Congress wanted urban power customers to subsidize rural customers. Congress encouraged rural electrification through favorable loans, *not* a subsidy achieved by granting borrowers a protected service territory.

Though the court below cited an apparent federal interest in repayment of federal loans, "[t]o the extent the REA believes that states must adopt rules of law that always allow federal lenders to recoup their investments,

it is mistaken." *Wabash Valley Power Ass'n, Inc. v. REA*, 903 F.2d 445, 454 (7th Cir. 1990). When a federal agency acts as lender, its loans are subject to state law and the same risks that affect the repayment of private loans. Applying state law to federal loans, therefore, does "*not* frustrate the objectives of the lending programs." *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 734 (1979).

Because loans are made "on the assumption that state regulation would apply" (*Wabash*, 903 F.2d at 455), a federal lender should consider the possibility of adverse state action *before* making a loan. *See Kimbell Foods*, 440 U.S. at 736-37. The ability to take the possibility of annexation into account in deciding *whether* to make a loan belies the claim of irreconcilable conflict between state law and the federal loan program. *See Northwest Centr. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 403, 517 (1989) (agency "will recognize [state regulation] as part of the environment in which appellant conducts its business, and will make its own decisions with that in mind"). A federal loan program would therefore seem to be a most unlikely source of preemption.

In fact, by regulation, the REA must specifically consider the risks posed by municipal annexation of a borrower's service area in determining whether the loan is feasible. 7 C.F.R. § 1710.112(b)(5).[18] As the dissenting judges emphasized below, having guessed wrong, or made

---

[18] The regulations provide:

> § 1710.112 Loan Feasibility
>
> * * *
>
> (b) . . . RUS will use the following criteria to evaluate loan feasibility:
>
> * * *
>
> (5) Risks of loss of portions of the borrower's service territory from annexation or other causes will not substantially impair loan feasibility.

7 C.F.R. § 1710.112(b)(5) (1995) (emphasis added).

insufficient investigation of the facts, the agency cannot fairly enlist a federal court to exonerate it for the consequences of its faulty prediction. *See* 49 F.3d at 1078; App. 32a-33a.

5. The Ninth Circuit rule relied upon by the Fifth Circuit panel is wholly out of step with this Court's subsequent decisions in *Kimbell Foods* (as discussed above) and *Arkansas Electric*. As emphasized by the dissenters below, *Arkansas Electric* expressly rejected the argument that state regulation of an REA borrower's rates would frustrate the REAct's objectives. 461 U.S. at 385-86. The Court emphasized that the REA is a "lending agency rather than a classic public utility regulatory body." *Id.* at 386. The REAct thus reflects no intention to displace the traditional authority of the states over utilities. The Court then stated the rule that the Fifth Circuit panel disregarded: the "relevant inquiry . . . is not whether Congress authorized or expected such [state] regulation, *but whether it intended by its own actions to forbid it.*" *Id.* at 388 n.11 (emphasis added).

The panel below addressed *Arkansas Electric* only on rehearing. It noted that *Arkansas Electric* left open the possibility that state action might so seriously compromise the "ability of the [cooperative] to repay its loans, as to be implicitly preempted by the [REAct]." 49 F.3d at 1075; App. 25a (quoting *Arkansas Electric*, 461 U.S. at 389). This case presents the opportunity to cast light on that possibility—a possibility that is itself difficult to reconcile with *Kimbell Foods* or this Court's repeated admonitions that preemption ought not be found absent a manifest conflict or clear preemptive intent.

In any event, it is difficult to suggest that the panel in this case actually framed its ruling on the terms that *Arkansas Electric* left open.[19] The panel did not discuss

---

[19] Moreover, the Ninth Circuit rule quoted by the panel contemplates preemption even though the compensation paid for the taking

the extent to which the ability to repay loans would be impaired—except in the general sense that a reduction of gross revenue makes it more difficult to repay one's loans. Moreover, it would seem that any effort to address that issue would have had to consider (at least) the compensation paid for the taking—including that portion of the compensation that would reflect lost future revenue.

6. The broad language often used by this Court to describe "frustration" plainly contributed to the error of the court below. Nonetheless, claims of "frustration" have almost always been *rejected* by this Court.[20] While the *Hines dictum* is frequently repeated, it is hard to find examples of "frustration" applied independent of other, better established grounds of preemption to support a decision.[21] "Frustration" is often used in connection with

---

would allow the federal loan to be repaid. 31 F.3d at 323-24; App. 8a-9a.

[20] *E.g., Freightliner Corp. v. Myrick*, 63 U.S.L.W. 4265, 4266 (April 18, 1995) ("A finding of liability against petitioners would undermine no federal objectives or purposes . . ., since none exist"); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 79, 86 (1987); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 220-23 (1983); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 636 (1981); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133-34 (1978); *Brotherhood of Locomotive Engineers v. Chicago, Rock Island & Pacific Railroad Co.*, 382 U.S. 423, 429, 437 (1966).

[21] For example, *Michigan Canners & Freezers Ass'n, Inc. v. Agriculture Marketing and Bargaining Bd.*, 467 U.S. 461 (1984), involved an actual conflict between state law and express provisions and "theme" of the federal statute. *Id.* at 471. "[B]ecause the [state law] authorizes . . . conduct that the federal Act forbids, it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 478.

International Paper Co. v. Ouellette, 479 U.S. 481 (1987), rested on the notion that the Clean Water Act required uniformity. *See also Gade v. National Solid Wastes Management Ass'n*, 505 U.S. ——, 112 S. Ct. 2374, 2383 (1992) (plurality), using "frustration" to enforce uniformity and as a short-hand for "conflict" (*id.* at

preemption of state law to enforce federal "uniformity," though it is sometimes used to describe actual conflict as well.

In *Hines* itself, the "frustration" language simply conflated two other, well established bases of preemption, "actual conflict" preemption, and occupation of the field. *See The Law of Preemption, a Report of the Appellate Judges Conference*, American Bar Association, at 27. "Frustration" had no independent significance; Congress occupied the field in an area of unique federal concern. *Id.*

Significantly, the only case of this Court cited by the Fifth Circuit panel to support its "frustration" finding, *Xerox Corp. v. County of Harris*, 459 U.S. 145 (1982), does not even mention "frustration." The narrow purposes of the federal statute at issue was to create duty-free enclaves. That purpose was historic, concrete, and arose out of federal control of foreign commerce. Like other "uniformity" cases, the statute's basic structure demonstrated Congress' purpose to bar all duties on the goods in question pending export, whether federal or state.

Applied as it was by the court of appeals panel, the "frustration" doctrine is "highly problematic," serving as a constitutional springboard for a "high degree of judicial policymaking" that displaces the legislative branch and the constitutional sovereignty of the states. 49 F.3d at 1078-79; App. 34a.

2386 n.2); *see id.* at 2389-90 (Kennedy, J., concurring) (defining conflict narrowly).

Felder v. Casey, 487 U.S. 136 (1988), used "frustration" but relied on the historic rule that a "federal right cannot be defeated by the forms of local practice." *Id.* at 138, 139-40, 150.

III. THE DECISION BELOW IS NOT SUSTAINABLE ON THE STATUTORY GROUND EMPLOYED BY THE DISTRICT COURT

Although the court of appeals reached out to rest on a broader constitutional theory, this case has its origins in the REA's assertion that 7 U.S.C. § 907 authorizes the REAct's Administrator to veto a municipal condemnation of a borrower's property. The court of appeals' refusal to adopt this primarily statutory ground for decision suggests, at a minimum, that the panel was not readily persuaded by its merit. The statutory theory was squarely rejected by the only appellate court that did address it.[22] It is without support in the REAct's language or structure. Section 907 provides that:

> *No borrower of funds* . . . shall, without approval of the Administrator, sell or dispose of its property, rights, or franchises . . . until any loan obtained from the Rural Electrification Administration . . . shall have been repaid.

7 U.S.C. § 907 (emphasis added). Consistent with the REAct's overall structure, this paragraph imposes an obligation upon a *"borrower of funds."* Like almost *any* borrower providing loan security, an REA borrower is barred from disposing of its loan security without its lender's consent. App. 76a-77a.

A condemnation, however, takes place by operation of law, irrespective of any action by, or even the wishes of, the property owner. The *condemnee* does not dispose of its property or participate in setting the compensation.[23] As explained in *City of Rochester*:

---

[22] *See City of Rochester v. Peoples Co-op Power Ass'n, Inc.*, 505 N.W.2d 621, 625-26 (Minn. App. 1993).

[23] The legislative history reflects the fact that the provision was designed to prevent borrowers from voluntarily transferring the benefits of subsidized loans to private, for-profit companies. 80 Cong. Rec. 2168, 3304-06, 3317, 7248, 7362, 7675; Hearings on S. 34-83 Before the House Committee on Interstate and Foreign Commerce, 74th Cong., 2nd Sess. 74 (1936).

> The Act restricts actions by the "borrower of funds" —in this case, Peoples. Peoples itself is not selling or disposing of its property; rather, the City is taking that property from Peoples. Important concerns justify such a distinction. Voluntary sales or disposals of REA-financed property by a borrower would not guarantee fair or adequate compensation. Condemnation proceedings, on the other hand, entail a careful determination and payment of fair value for that property.

505 N.W.2d at 625.

Nothing in the REAct subjects any third party to REA authority. In fact, the *first* paragraph of § 907 addresses *in*voluntary dispositions—forced sales. For forced sales, the REA is *not* given veto power, but only a right of redemption. 7 U.S.C. § 907. Only with respect to the actions of its borrower—with whom it has a contract—does the REA have approval power.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

WALLACE E. BRAND
Suite 1000
1730 K Street, N.W.
Washington, D.C. 20006
(202) 347-7002

CLIFTON S. ELGARTEN *
AMY J. MAUSER
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2500
Attorneys for Petitioner

* Counsel of Record

ARCHIVE

APPENDIX—TABLE OF CONTENTS

		Page
A.	OPINION OF THE COURT OF APPEALS	1a
B.	OPINION AND ORDER OF THE DISTRICT COURT	12a
C.	OPINION AND ORDER OF THE COURT OF APPEALS ON REHEARING	24a
D.	THE RURAL ELECTRIFICATION ADMINISTRATION'S DECISION	35a
E.	EXCERPTS FROM THE RURAL ELECTRIFICATION ACT	76a
F.	THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION	82a

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-4295

CITY OF MORGAN CITY,
Plaintiff-Intervenor-Defendant-Appellant,

v.

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION,
Defendant-Intervenor-Appellee,
Third Party-Plaintiff-Appellee,

and

CAJUN ELECTRIC POWER COOPERATIVE, INC.,
Intervenor-Plaintiff-Appellee,

and

UNITED STATES OF AMERICA, thru Rural Electrification Administration (REA),
Third Party-Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana

Sept. 12, 1994

Before POLITZ, Chief Judge, DAVIS and WIENER, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

This appeal revolves around a municipality's attempt to condemn equipment and electricity consumers within an area annexed by the municipality. South Louisiana Electric Cooperative Association (SLECA), the current electricity providers, along with their federal financier, the Rural Electrification Administration (REA), opposed the state-law expropriation and sought summary judgment. The district court found that the REA Administrator had authority under the Rural Electrification Act (REAct), 7 U.S.C. § 901 et seq., to withhold approval of the state-law expropriation so that the state-law expropriation was preempted under the Supremacy Clause, 837 F.Supp. 194. We affirm on the alternative ground that the state-law expropriation is preempted because it would frustrate a federal purpose.

I.

In January 1985, the City of Morgan City annexed a small suburban area containing approximately 252 electricity consumers. These electricity consumers were serviced by SLECA, a rural power cooperative financed by the federal government under the REAct.[1] SLECA buys its power in bulk from Cajun Electric Power Cooperative (Cajun), also an REA-financed cooperative.[2] To secure their federal loans, SLECA and Cajun have mortgaged their assets to the REA.

After the annexation, Morgan City, which operates its own municipal utility,[3] offered to purchase all of SLECA's

---

[1] To date, SLECA has obtained 25 REA loans totalling over $38 million, $25 million of which is outstanding.

[2] To date, Cajun has obtained $3 billion in REA loans.

[3] Morgan City's utility system purchases its bulk supply from the Louisiana Energy and Power Authority and sells to its customers at a rate 15% lower than SLECA's.

property in the area, including the exclusive right to provide power to electricity consumers in the area. When SLECA refused the offer, Morgan City brought this expropriation action pursuant to L.R.S. 19:101 et seq., seeking to condemn the disputed property rights.

Cajun intervened as a party defendant. The REA was joined as a third party defendant on the basis of its security interest in the property at issue and removed the case to federal court.

Thereafter, the REA Administrator filed into the record a signed declaration objecting to Morgan City's state-law expropriation on grounds that the expropriation would jeopardize the REA's ability to protect its loans and would cause substantial harm to the federal rural electrification program.

The Administrator asserted that the threatened expropriation would frustrate the federal rural electrification program for several reasons. First, the annexed area is the most heavily populated part of SLECA's service area and thus is the area SLECA is able to serve most economically and efficiently. Thus, the disputed area provides SLECA with its most profitable customers. According to the Administrator, loss of this area's customer load could jeopardize SLECA's financial health and result in a rate increase for SLECA's remaining customers. The Administrator contends that this danger is especially acute in light of the impact of future planned expropriations in the Morgan City area whose cumulative impact on SLECA's electric system would be devastating.

The Administrator further objected to the expropriation on grounds that the expropriation could negatively affect not only SLECA, but the entire chain of REA-financed member cooperatives. Cajun provides power under wholesale contracts to twelve other REA-financed distribution cooperatives, which in turn distribute to rural electricity customers. Reduction in the volume of Cajun's

distributions as a result of this and other state-law expropriations could increase the cost of Cajun's wholesale power. This increase in cost of electric power would be passed on to the entire rural area serviced by federally financed member distributor cooperatives.

The REA, joined by SLECA and Cajun, filed a motion to dismiss or, in the alternative, for summary judgment, arguing that Morgan City's expropriation action was preempted by the REAct. The district court granted the defendants' summary judgment motion and dismissed the expropriation. The court based its ruling on two conclusions: (1) the Administrator's determination that the expropriation would be contrary to the federal rural electrification program was not arbitrary and capricious; and (2) the REAct, 7 U.S.C. § 907, authorized the Administrator to withhold approval of the transfer even though the transfer was involuntary. The City of Morgan City appeals.

II.

The federal government, when acting within the confines of its constitutional authority, is empowered to preempt state law to the extent necessary to achieve a federal purpose. U.S. Const. art. VI, cl. 2. The Supreme Court has explained that preemption of state law may occur in several different ways. *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 368-69, 106 S.Ct. 1890, 1898, 90 L.Ed.2d 369 (1986). First, Congress may expressly preempt state law. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 203, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983). Second, Congress may legislate so comprehensively that it creates a "reasonable . . . inference that Congress left no room for the States to supplement it." *Id.* at 204, 103 S.Ct. at 1722. Under such circumstances, where Congress intends that federal law "occupy the field"—i.e., be exclusive in the area, state law within the field is preempted. Third, state law is displaced to

the extent that it conflicts with federal action. *Id.* This last breed of preemption, conflict preemption, may occur in two ways. First, a provision of state law may be incompatible with a federal statute such that compliance with both is a "physical impossibility." *Id.* Second, even if compliance with both is not impossible, state law is nonetheless preempted if its application would disturb, interfere with, or seriously compromise the purposes of the federal statutory scheme. *Id.* In other words, an application of state law that would frustrate the purpose of a federal statutory scheme is preempted. *See id.* at 220-21, 103 S.Ct. at 1731.

In this case, we elect to turn directly to the applicability of the second variety of conflict preemption to the facts presented by the summary judgment evidence. *See United States v. Early,* 27 F.3d 140, 142 (5th Cir.1994) (court can affirm on an alternative basis). Accordingly, we save for another day the issue of whether 7 U.S.C. § 907 by its terms confers authority on the Administrator to withhold approval of an involuntary disposition, and instead consider only whether a conflict exists because the proposed state-law expropriation would frustrate a federal purpose.

Under the second variety of conflict preemption, Morgan City's expropriation may be preempted if the action would frustrate a federal purpose. Stated differently, state action is preempted if its effect is to discourage conduct that federal legislation specifically seeks to encourage. For example, in *Xerox Corp. v. County of Harris,* 459 U.S. 145, 103 S.Ct. 523, 74 L.Ed.2d 323 (1982), the Supreme Court held that a state tax could not be imposed on goods manufactured in Mexico, shipped to the United States, and held under bond in a customs warehouse awaiting shipment abroad. *Id.* at 154, 103 S.Ct. at 528. The Court found that a long history of federal legislation indicated a clear intent to create duty-free enclaves for such imported goods stored in this country pending ex-

port so as to encourage merchants to use American ports. *Id.* at 150-52, 103 S.Ct. at 525-27. The Court held that although a state tax on such goods was not expressly prohibited, its imposition was preempted because such a tax would manifestly discourage and financially penalize the very acts the federal law was meant to foster. In this vein, we therefore turn our attention in this case to the effect of the state-law expropriation on the federal legislation.

1. *The Goals of the REAct*

In 1936, Congress enacted the REAct for the purpose of ensuring that electric service would be provided to rural America. By enacting the legislation and creating the REA, Congress determined that the national interest would be served by subsidizing the rural user of electricity. Prior to the REAct, rural areas which were thinly populated and had lower demand for electricity failed to attract investor-owned utilities for the obvious reason that providing service to these areas was costly and therefore unprofitable. *See, e.g., Tri-State Generation & Transmission Assn., Inc. v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1348 (10th Cir.1989). The REA encouraged rural electrification by providing low interest insured loans and loan guarantees to cooperatives. 7 U.S.C. § 903; *see also Alabama Power Co. v. Alabama Electric Cooperative, Inc.*, 394 F.2d 672 (5th Cir.1968).

In response to the REAct, rural communities formed non-profit electric distribution cooperatives, such as SLECA, which were financed by the REA. After these REA-financed distribution cooperatives were formed, groups of cooperatives banded together to form central generation and transmission cooperatives (G & Ts) to obtain a less expensive, long-term source of power. To enable the formation of the G & Ts, the member distribution cooperatives entered into long-term wholesale power contracts with the G & Ts for electricity. *See, e.g., Tri-State*, 874 F.2d at 1348.

The REA's security for loans is limited to the physical assets of its borrowers and the revenue generated by its borrowers, the G & T's and the distribution cooperatives. Thus, the relationship among the G & Ts, distribution cooperatives and the REA is structured through these wholesale power contracts. This contract obligates a distribution cooperative, such as SLECA, to purchase all of its electric power over a fixed term from a G & T, such as Cajun. When lending money to a G & T, the REA requires the G & T to enter into wholesale power contracts with member distribution cooperatives. Likewise, when the REA lends money to distribution cooperatives, the REA requires those distribution cooperatives to enter into similar contracts with G & Ts. This arrangement ensures that REA G & T and distribution borrowers will be able to earn revenue sufficient to meet their costs, service their REA debt, and continue to provide permanent, low-cost electric service to rural areas. *Id.*

2. *Louisiana's Expropriation Statute*

Morgan City seeks to condemn property, and, more significantly, the right to service electricity consumers who are currently serviced by SLECA and Cajun under a wholesale power contract. Louisiana's expropriation law provides generally that any Louisiana municipality may expropriate property whenever necessary for the public interest as determined by the governing authority of the municipality, or, in cases such as this, by the trial judge when the taking is contested. LSA-R.S. 19:102.

In this case, the critical question is whether Louisiana's expropriation law, as applied and interpreted, would frustrate the federal purpose underlying the REAct. We recognize that the Supreme Court has made clear that there is no litmus test for determining whether a particular application of state law would frustrate a federal purpose:

> This Court, in considering the validity of state laws in the light of . . . federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of th[e] particular case, [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).

We find the Ninth Circuit's opinion in *Pend Oreille* helpful and persuasive in answering the question before us. In *Pend Oreille*, the Ninth Circuit concluded that under the Supremacy Clause, a state municipal public utility could not condemn property owned by a federally subsidized utility because the condemnation would interfere with the federal purpose of the REAct. *Pend Oreille*, 417 F.2d 200, 201-02 (1969). The Ninth Circuit reasoned that the proposed condemnation of a portion of a federally subsidized rural electrification system, even if compensated for under state law, would impair Congress's objective of providing reliable, low-cost electricity to rural America. The court concluded that removal of the targeted portion of the system would weaken the remainder of the system and lessen its ability to function effectively:

> This is not an ordinary case because what is sought to be taken here is part of a system and even if the part taken is paid for, and if an award is made for the damage to the remaining portion, a question remains as to the capacity of the remaining portions of the system to function. . . . [I]f, as a result of

> the condemnation, the loans were paid in full, but the remaining portions of the system could not continue to operate with decent service and at decent rates, the Government would have been paid but the purpose of the Rural Electrification Act would have been frustrated.

Id. at 201. The Ninth Circuit concluded that, under these circumstances, "a state [condemnation] law written so that a state-favored utility can by its unilateral action interfere with the federal purpose cannot stand under the Supremacy Clause." *Id.* at 202.

A panel of this court followed *Pend Oreille's* reasoning in an analogous case, *City of Madison v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057 (5th Cir.1987). In *Bear Creek*, we barred a municipal utility's proposed condemnation of a densely populated portion of a federally subsidized rural water utility. In reaching this conclusion, the *Bear Creek* court reasoned that:

> Even if fair value is paid for the lost facilities, such an action would inevitably have an adverse effect on the remaining customers . . ., in the form of lost economies of scale and resulting higher per-user costs. To allow expanding municipalities to "skim the cream" by annexing and condemning those parts of a water association with the highest population density (and thus the lowest per-user cost) would undermine Congress's purpose of facilitating inexpensive water supplies for farmers and other rural residents and protecting those associations' ability to repay their FmHA debts.

Bear Creek, 816 F.2d at 1060 (citing *Big Bend*, 618 F.2d 601).

Morgan City argues that the relatively small number of SLECA consumers subject to this expropriation action distinguishes this case from both *Pend Oreille* and *Bear*

Creek. But 252 users in a densely populated area is significant, obviously enough to attract Morgan City's interest in providing electric service to the area. Here, as in *Bear Creek*, a municipally-owned utility seeks to condemn an economically profitable service area developed through federal financing. The state law authorizing the condemnation takes no account of the potential prejudice to rural electricity consumers served by federally funded cooperatives. Permitting Morgan City to condemn these 252 users would pave the way for piecemeal erosion of other high-density service areas adjacent to Morgan City and other cities. Such action could well leave federally funded cooperatives financially unable to continue service to the remaining low-density areas not targeted by municipally-owned or investor-owned utilities. And we do not consider this concern hypothetical in light of the evidence in the record of future proposed annexations in the Morgan City area, as well as the Houma, Louisiana area. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 130-31, 98 S.Ct. 2207, 2216, 57 L.Ed.2d 91 (1978) (hypothetical conflict not sufficient to warrant preemption). The REA's conclusion that this attempted condemnation would jeopardize the federal rural electrification program is amply supported by the record.

Were Morgan City's expropriation action allowed to stand, it would "stand as an obstacle" to the repayment of federal loans, to the financial viability of federally financed electricity cooperatives, and ultimately, to the maintenance of electricity service to rural areas. *See Hines*, 312 U.S. at 67, 61 S.Ct. at 404. As the Ninth Circuit noted, "Congress has declared the federal purpose to electrify the American farm. No matter how we characterize the vehicle which gets the electricity there, a state law so written that a state favored utility can by its unilateral action interfere with the federal purpose cannot stand under the Supremacy Clause of the Constitution of the United States." *Pend Oreille*, 417 F.2d at 202.

Because we find that the proposed state-law condemnation would frustrate the federal purpose of providing low-cost, reliable electric service to rural areas, the state-law condemnation proceeding is preempted under the Supremacy Clause. We therefore affirm the district court's dismissal of that action.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
W.D. LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Civ. A. No. 91-0523

CITY OF MORGAN CITY

v.

SOUTH LOUISIANA ELECTRIC, *et al.*

Feb. 25, 1993

MEMORANDUM RULING

DOHERTY, District Judge.

This matter comes before the Court on a number of motions filed on behalf of both plaintiff and defendants in this matter. In order to facilitate ruling on the issues, the Court asked all parties to further brief the narrow issue of the Rural Electrification Administration ("REA") "approval authority" as to a condemnation by the State of electrical facilities which are indebted to the REA.

Procedural History

On August 3, 1990 the City of Morgan City filed in the 16th Judicial District Court, Parish of St. Mary, a petition for expropriation seeking to condemn property and electric service rights owned by defendant, South Louisiana Electric Cooperative Association ("SLECA"),

a federally financed, non-profit cooperative. On January 11, 1991, a petition of intervention was filed on behalf of Cajun Electric Power Cooperative, Inc. ("Cajun"); the United States was also joined as a third party defendant on the basis that the United States holds a security interest in the property which is the subject of this proceeding. The United States timely removed the state court proceeding to this Court on March 11, 1991. Cajun then filed with this Court on June 5, 1991 an amended petition of intervention, alleging noncompliance with 7 U.S.C. § 907 with this Court on June 5, 1991.

On August 29, 1991 Morgan City filed a Motion to Dismiss Cajun's amended petition of intervention and said motion was denied by the Honorable Richard T. Haik, Sr. on October 17, 1991. On December 9, 1991 this case was transferred to the Honorable Rebecca F. Doherty.

Presently before this Court are Motions to Dismiss and in the alternative for Summary Judgment filed on behalf of the United States of America, SLECA and Cajun, seeking to dismiss plaintiff's claims arguing that state law based expropriation cannot proceed under the Supremacy Clause of the United States Constitution, and the Rural Electrification Association, as part of the United States Department of Agriculture, has withheld its statutory and preemptive authority to approve the property transfer under 7 U.S.C. § 907. Also pending before the Court is a Motion for Partial Summary Judgment filed on behalf of the City of Morgan City based on preemption claiming the REA administrator has not met the procedural requirements under the Administrative Procedure Act, 5 U.S.C. § 553, and the Federal Register Act, 44 U.S.C. § 1505 and 1510, which are pre-conditions to administrative preemption by regulation, or in the alternative that the REA administrator has not been delegated by Congress the authority to preempt state law solely for the purpose of relieving the economic pressures on rural electrical cooperatives.

Morgan City has also filed an appeal from Magistrate Judge Methvin's ruling of October 22, 1992 wherein the Magistrate Judge denied the City's Motion to Compel production of documents and answers to interrogatories propounded to the United States of America. Additionally, the United States has filed a Motion to Strike documents filed by the City of Morgan City in support of their appeal of the Magistrate's ruling.

This Court GRANTS the Motion to Dismiss filed on behalf of the United States of America, SLECA and Cajun and DENIES the Motion for Partial Summary Judgment filed on behalf of the City of Morgan City. Further, this Court upholds the Magistrate's ruling and therefore DENIES the appeal by the City of Morgan City which renders MOOT the motion by the United States of America to strike documents filed in connection with the City of Morgan City's appeal of the Magistrate's ruling for the following reasons to wit:

This case concerns the pending expropriation by the City of Morgan City of approximately 252 SLECA customers, as well as the lines, poles, transformers and other equipment serving these customers. This expropriation is a result of Phase II of Morgan City's annexation plans, which went into effect in 1986. The annexation itself has occurred and therefore will not be affected by the outcome of this case. A Phase III annexation which would involve an additional approximately 267 SLECA customers and the same lines, poles, transformers and related equipment will occur in the future according to the sworn deposition testimony of the Honorable Cedric S. LaFleur, Mayor of the City of Morgan City and its consulting engineer, Harold J. Beard. Morgan City has offered to pay SLECA a total of $895,955.78 over a period of 8 years at $111,994.47 a year, for the expropriation of SLECA's facilities in Phase II. (SLECA Exhibit 1)

On June 16, 1992 a 28 page report with numerous attachments and studies, produced by the staff of the REA, was adopted by the administrator pursuant to 7 U.S.C. § 907, withholding his approval of the proposed expropriation by the City of Morgan City.

The REA Act provides at 7 U.S.C. § 907:

> "No borrower of funds under § 4 of § 201 (7 U.S.C. § 904 or § 922) shall, without the approval of the Administrator, sell or dispose of its property, rights, or franchises, acquired under the provisions of this Act, until any loan obtained from the Rural Electrification Administration, including all interest and charges, shall have been repaid."

The central issue in this matter has been the ongoing dispute between the parties as to the authority of the REA Administrator under § 907 to withhold approval of the expropriation and thereby essentially preempt Morgan City's state granted power of expropriation. This Court, in a minute entry dated December 4, 1992, asked all parties to brief the narrow issue of whether or not the REA has the authority pursuant to 7 U.S.C. § 907 to prevent the expropriation of SLECA's property by the City of Morgan City.

The Court now must make a determination of whether 7 U.S.C. § 907 preempts, by conflict and pursuant to the Supremacy Clause, the state expropriation power granted by the State of Louisiana to the City of Morgan City.

The inquiry begins with analysis of 7 U.S.C. § 907. Does the prohibition that no borrower shall without the administration's approval "sell or dispose of its property . . ." extend to *involuntary* disposal, i.e., expropriation.

This Court notes that the issue of REA's authority to approve or disapprove an expropriation pursuant to § 907 has been previously addressed in the Ninth Circuit cases of *Public Utility District No. 1 of Pend Oreille County v. United States*, 417 F.2d 200, 201-202 (9th Cir.1969) and *Public Utility District No. 1 of Franklin*

County v. Big Bend Electric, 618 F.2d 601, 603 (9th Cir.1980). In both cases, the Ninth Circuit held that under § 907 a borrower's property may not be disposed of by any means, including involuntary condemnation or expropriation, without REA's approval. The Fifth Circuit has expressly approved the holding and rationale of *Big Bend, supra*, in the case of *City of Madison, Miss. v. Bear Creek Water Association, Inc.*, 816 F.2d 1057, 1060 (5th Cir. 1987).

It is apparent to this Court that the Fifth Circuit Court of Appeals has enforced the Supremacy Clause principles barring municipal condemnations that interfere with federal programs. In *Bear Creek*, 816 F.2d 1057, a municipality attempted to condemn property of a water association financed in part by the Farmers' Home Administration ("FmHA") under a federal program. The district court granted FmHA's motion for summary judgment because the water association was indebted to FmHA, and federal statute, 7 U.S.C. § 1926(b), prevented municipal condemnations of property owned by federally indebted water associations.

In affirming the district court the Fifth Circuit cited the opinion of *Big Bend* and emphasized that the Supremacy Clause prevents municipalities from condemning property Congress has protected from being removed from its role in a federal program stating:

> The case at bar exemplifies the evil Congress wished to avoid. [The association's] affidavits showed that [the municipality] desires to condemn . . . the most densely populated (and thus most profitable) territory now served by [the association]. Even if fair value is paid for the loss of the facilities, such an action would inevitably have an adverse effect on the remaining customers . . . in the form of lost economies of scale resulting in higher per user costs. To allow expanding municipalities to 'skim the cream' by annexing and condemning those parts of

> the water association with the highest population density (and thus the lower per use cost) would undermine Congress' purpose of facilitating inexpensive water supplies for farmers and other rural residents and protecting those associations' ability to repay their FmHA debts. See *Big Bend*, 618 F.2d 601 (9th Cir.1980) (Similarly rejecting utilities attempt to condemn property owned by cooperative finance by REA).

Id. at 1060.

Morgan City and the amici curiae, American Public Power Association, the National Institute of Municipal Law Officers and the National League of Cities argue that the cases from the Ninth Circuit are no longer good law as they were decided prior to the Supreme Court's decision in *Arkansas Electric Co-op Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 103 S.Ct. 1905, 76 L.Ed.2d 1 (1983) and that case *sub silentio* reversed or overruled the previous cases decided by the Ninth Circuit concerning § 907. After a review of *Arkansas Electric* this Court finds that § 907 was not at issue, rather, *Arkansas Electric* addressed a state regulatory body's jurisdiction over cooperatives. Further *Arkansas Electric* only addresses express and field preemption, neither of which is relevant to this case involving preemption by conflict. *Arkansas Electric*, *supra*, at 388, 103 S.Ct. at 1914. Indeed, the Fifth Circuit specifically embraced the Supremacy Clause preemptive exclusion of *Big Bend* in 1987, some four (4) years *after Arkansas Electric* was decided. *Bear Creek*, *supra* at 1060. Therefore, this Court considers the Ninth Circuit opinions concerning § 907 to be good law and adopts the rationale which supports both the two Ninth Circuit cases and the Fifth Circuit's opinion in *Bear Creek*, supra.

State laws are preempted if their operational effect is to "disturb" or "interfere with" a federal program or activity regulated by federal statute. *California v. F.E.R.C.*,

495 U.S. 490, 506-7, 110 S.Ct. 2024, 2033-34, 109 L.Ed.2d 474 (1990). As stated, state law is preempted by conflicting federal law even if the federal law contains no preemptive language, reflects no Congressional intent to preempt, and impacts transactions traditionally regulated by state laws, including transactions involving real property. *Michigan Canners & Freezers Assoc., Inc. v. Agricultural Marketing & Bargaining Board*, 467 U.S. 461, 469-70, 104 S.Ct. 2518, 2523, 81 L.Ed.2d 399 (1984).

The REA, in order to provide the long term capital needed for the construction of the costly generation and transmission facilities which provide the Generation and Transmission Cooperatives ("G & Ts") member distribution cooperatives with economic long term power, must determine that the security for the various loans is "reasonably adequate." 7 U.S.C. § 904.

Congress, in the REAct gave the REA the right to protect a declared national interest in electrifying rural America and a small measure of safety for ensuring continued existence of the "reasonably adequate" security upon which it bases its decision to make a long term loan. That measure is contained in 7 U.S.C. § 907.

As previously stated, the courts are uniform in holding that 7 U.S.C. § 907 requires approval of the REA as a pre-requisite to proposed expropriation. Without the required approval, cooperatives subject to the REAct cannot sell or dispose of assets by any means, contrary state law notwithstanding. The Court in *Pend Oreille, supra,* stated:

> "Congress has declared the federal purpose to electrify the American farm. No matter how we characterize the vehicle which gets the electricity there, a state law so written that a state favored utility can by its unilateral action interfere with the federal pur-

pose cannot stand under the Supremacy Clause of the Constitution of the United States."

Pend Oreille, 417 F.2d at 202.

Similarly, in *Big Bend*, supra the court reasoned:

"The purpose of the Act is to provide low cost electricity to rural America." *Big Bend*, 618 F.2d at 603. Additionally, but in no way controlling, this Court cannot ignore the potential of similar action by similarly situated communities and the resultant destructive impact on the REA and its stated purpose. Therefore, based upon jurisprudence cited, this Court finds to allow the expropriations would be in direct conflict with and thwart the explicit congressional purpose of the REA. The City of Morgan City expropriation must fall.

City of Morgan City also directs this Court's attention to a state court decision, *City of Rochester v. People Cooperative Power Association, Inc.*, No. C090281 (Minn. 3rd JDC, Olmstead City) for the proposition that Louisiana's expropriation law does not conflict with § 907. The case involved Minnesota's "Quick Take" law which was seeking to condemn, immediately, certain cooperative service rights conferred by state law. Defendants challenged the "Quick Take" law on the grounds that it conflicted on its face with § 907 and was invalid. This case is readily distinguished from the one at issue here, as the REA had issued no administrative decision in the Minnesota case which determines that the proposed condemnation would decrease the ability of the REA to achieve the purpose of the REAct. Further, in apparently almost three years since the Minnesota action began, the Administrator had conducted no analysis, economic or otherwise, to determine what the effect would be on the Peoples or the rural electrification system if Peoples lost the right to service some of its facilities. Further, this Court finds that the Minnesota case is far from a final determination as it is presently on appeal in the higher

courts of Minnesota. Therefore, this Court declines to follow the holding in *City of Rochester*.

In the instant case, the REA has made a determination that the City of Morgan City's proposed condemnation would decrease the ability of the REA to serve its purpose. City of Morgan City disputes this determination and contends that the proposed condemnation would actually facilitate rural electrification by making the distribution of electricity more efficient. City of Morgan City contends that because the issue of the wisdom of the taking is disputed, the district court erred in granting a summary judgment to the United States in *Big Bend*. The argument does not follow.

REA is the administrative agency charged by Congress with the responsibility for facilitating rural electrification. REA was intended by Congress to determine the appropriate course of conduct to accomplish the legislative purpose. Courts properly give wide latitude to agency determinations in their areas of expertise. *See National Broadcasting Co. v. Federal Communications Commission*, 516 F.2d 1101, 1122 (D.C.Cir.1974) *cert. denied sub nom., Accuracy in Media, Inc. v. National Broadcasting Co.*, 424 U.S. 910, 96 S.Ct. 1105, 47 L.Ed.2d 313 (1976). The standard of review for administrative agency determination is one of arbitrary, capricious, or an abuse of discretion. *See* 5 U.S.C. § 706. Therefore, after determination that the REA has the authority to withhold approval of an expropriation, this Court is not to revisit the merits of the argument presented to the REA rather is to review the administrative agency actions for procedural validity and under an arbitrary and capricious and/or abuse of discretion standard of review. The administrator of the REA through staff reviewed the issues and issued a 28 page report with numerous attachments and studies. As a result of and/or within this study, the administrator withheld this approval of the proposed expropriation. Full explanation was made

in the 28 page report. Upon review, the administrator's decision cannot be said to be arbitrary and capricious or an exercise of abuse of discretion, particularly given the value of the property to be expropriated versus the proposed payout, the selection of the City of the densest service population of SLECA for expropriation and the resultant negative impact on SLECA of the expropriation. This is discussed further in review of the Magistrates' ruling below.

Appeal of Magistrate's Ruling

In the Magistrate's decision of October 22, 1992, Magistrate Judge Methvin found that the Administrator's decision withholding approval for the expropriation was proper and that no authority required that the REA conduct an evidentiary hearing before issuing a decision under § 907. Agency action taken without a formal evidentiary hearing, but based on an administrative record and subject to judicial review on the basis of that record is constitutional. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 375-377, 109 S.Ct. 1851, 1860-61, 104 L.Ed.2d 377 (1989).

In this matter the REA compiled a very thorough administrative record and granted an exhaustive decision in which it independently verified and analyzed the facts and logic underlying the submissions by various parties. Therefore, when an agency's determination is based on the administrative record, as in this case, the administrative decision should be reviewed in the light of that record. *Bowles v. U.S. Army Corps of Engineers*, 841 F.2d 112, 116 (5th Cir.) *cert. denied*, 488 U.S. 803, 109 S.Ct. 33, 102 L.Ed.2d 13 (1988).

Judicial review is limited to a review of the administrative record and may only be remanded to the REA for further consideration if this Court finds the decision was arbitrary and capricious in light of the record as a matter of law. The burden of establishing that an agency's

actions are arbitrary and capricious lies with the party objecting to it. *Electronic Data Systems Corp. v. N.L.R.B.*, 938 F.2d 570, 573 (5th Cir.1991). This Court finds in a review of the decision rendered on behalf of the REA opposing the expropriation that the decision was not arbitrary and capricious rather that the authority was withheld to prevent a dissipation of the security for loans made by the REA to both SLECA through Cajun.

This Court notes that the federal government, through the REA, has loaned directly or guaranteed loans to Cajun of approximately $3.2 billion. The federal government's security for these loans is limited to the assets of Cajun and the revenue stream resulting from the sale of electric power generated by the facilities constructed by Cajun to its members/owner distribution cooperatives, including SLECA, under the All Requirements Wholesale contracts. Loans for the construction of multi-million dollar generating plants were made on the basis of existing load and anticipated future load of SLECA and Cajun's other member distribution cooperatives with the expectation that those loads would continue and grow in order to generate the revenue stream necessary to repay the loans. The report by the REA details the backgrounds of both Cajun and SLECA including the financial stability of the cooperatives, which is of particular concern to the United States considering the $3.2 billion debt involved. The REA made a detailed analysis of the ability of Cajun and SLECA to repay these loans and the impact of the proposed expropriation on this repayment. Further, the expropriation would result in a loss of operating margins, as the customers sought to be expropriated by the City of Morgan City are located in SLECA's highest density service area. Therefore, expropriation of these customers would reduce the payment base and thereby force higher rates on those being served in less dense areas, thereby frustrating the original intent of the REA, i.e., to provide affordable electric service to

the rural areas of this country. Further, the expropriation by stripping SLECA's densest service area could place repayment itself in jeopardy.

Therefore, this Court finds that the REA administrator compiled an administrative record more than 300 pages in length fully detailing its decision, and that the decision issued on behalf of the agency and approved by the administrator was not arbitrary and capricious. The decision of the Magistrate will be UPHELD by this Court.

Further, this Court also finds that the Rural Electrification Act, 7 U.S.C. § 901's stated purpose is to facilitate rural electrification and as a part of its programmatic interest gave the REA Administrator in 7 U.S.C. § 907 the power to approve or withhold approval of disposal which thwarts this purpose, by any means, including condemnation of the REA financed electric cooperative property under state laws. Any holding to the contrary would severely hinder and jeopardize the REA's ability to protect either the security for its loans and loan guarantees or the overall rural electrification program.

Therefore, considering the foregoing, this Court GRANTS the Motions to Dismiss filed on behalf of the United States of America, the South Louisiana Electric Cooperative Association, and Cajun Electric Power Cooperative, Inc. This Court DENIES the motion for Partial Summary Judgment filed on behalf of the City of Morgan City. Further, this Court DENIES the appeal from Magistrate Judge Methvin's ruling dated October 22, 1992 filed on behalf of the City of Morgan City. The Motion to Strike Documents filed on behalf of the United States of America is rendered MOOT.

THUS DONE AND SIGNED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-4295

CITY OF MORGAN CITY,
Plaintiff-Intervenor-Defendant-Appellant,

v.

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION,
Defendant-Intervenor-Appellee, Third Party-Plaintiff-Appellee,

and

CAJUN ELECTRIC POWER COOPERATIVE INC.,
Intervenor-Plaintiff-Appellee,

and

UNITED STATES OF AMERICA, thru Rural Electrification Administration (REA),
Third Party-Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana

April 3, 1995

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Before POLITZ, Chief Judge, DAVIS and WIENER, Circuit Judges.

PER CURIAM:

We deny Morgan City's petition for rehearing in this case.[1] We take this opportunity, however, to address a number of Morgan City's arguments.

Morgan City first argues that we have created a far-reaching "per se" rule of preemption that is inconsistent with the Supreme Court's decision in *Arkansas Electric Coop. Corp. v. Arkansas Public Service Commission,* 461 U.S. 375, 103 S.Ct. 1905, 76 L.Ed.2d 1 (1983). The *Arkansas Electric* case is distinguishable. In that decision, a rural electric cooperative mounted a facial challenge to a state's right to regulate a rural cooperative's wholesale electric rates. The Court held that the Rural Electrification Act ("REAct"), 7 U.S.C. § 901 et seq., does not preempt a state's "mere assertion of jurisdiction" to regulate a cooperative's rates. *Id.* at 389, 103 S.Ct. at 1915.

In the present case, SLECA does not assert a facial challenge to a state's power to regulate or expropriate a rural cooperative's service area and equipment. Rather, SLECA challenges actual expropriations of its specific property and service rights. Morgan City's characterization of our decision as creating a "per se" rule of preemption is therefore mistaken. The panel's preemption analysis focussed on the actual effect of these specific expropriations, not whether the REAct facially preempts all attempts by states to expropriate the property of a rural cooperative. Significantly, *Arkansas Electric* confirms that concrete action taken by a state "may so seriously compromise important federal interests, **including the ability of the [coop] to repay its loans,** as to be implicitly preempted by the Rural Electrification Act." 461 U.S. at

---

[1] *City of Morgan City v. South Louisiana Elec. Coop. Ass'n,* 31 F.3d 319 (5th Cir.1994).

389, 103 S.Ct. at 1915 (emphasis added). Morgan City's argument is thus unavailing.

Morgan City argues next that the language of the REAct does not create a federal purpose which could be frustrated if the threatened condemnation were allowed to proceed. We disagree. The language of 7 U.S.C. § 907 reflects Congress' concern that piecemeal disposition of a cooperative's property and service rights might impair the Rural Electrification Administration's ("REA") security interest in the cooperative's assets. Section 907 prohibits a cooperative or other entity that borrows funds from the REA from "sell[ing] or dispose[ing] of its property, rights, or franchises" without the agency's prior approval. In the panel opinion, we declined to decide whether § 907 should be interpreted broadly enough to allow the REA to prevent a proposed expropriation.[2] However, at the very least, the provision reflects a general federal policy of protecting the integrity of the REA's security interests. Thus, even a narrow interpretation of § 907 supports the panel's preemption analysis.

Finally, we reject Morgan City's contention that the record does not support the panel's conclusions. SLECA's summary judgment evidence includes a copy of a comprehensive twenty-eight page report on the effect of proposed expropriations prepared by the REA, the agency charged with administering the REAct. The report considered not only the number of SLECA's customers affected by the expropriations, but also the extent to

---

[2] The Ninth Circuit has suggested in two decisions that § 907 might authorize the REA to block a proposed expropriation. In both decisions, however, the court ultimately based its holding on the fact that the proposed condemnation frustrated a federal purpose. *See Public Utility District No. 1 of Franklin County v. Big Bend Elec. Coop., Inc.*, 618 F.2d 601, 603 (9th Cir.1980); *Public Utility District No. 1 of Pend Oreille County v. United States*, 417 F.2d 200, 200-202 (9th Cir.1969).

which these customers accounted for a large percentage of SLECA's revenues because of the density of the service area involved. The report concludes that the planned condemnations would reduce SLECA's gross revenues by $768,000 annually and decrease its system operating margins by 88.26%. In assessing the effect of the condemnations, the REA also considered future planned expropriations by Morgan City (the Phase III Plan) and the nearby City of Houma.

Morgan City's summary judgment affidavits fail to effectively rebut the REA report's detailed findings. Morgan City's primary contention is that the panel should not have considered the proposed future expropriations in assessing the impact on SLECA. However, these proposed condemnations were not merely hypothetical threats. SLECA points to testimony by Morgan City's mayor that Phase III was fully planned and ready for implementation. The REA report also points to statements by Houma city officials revealing that the city planned to expropriate SLECA's adjoining service area. These planned future expropriations were thus highly relevant to assessing the overall impact of the expropriations on SLECA. If courts are not allowed to consider fully planned future expropriations under these circumstances, states and municipalities could escape preemption by merely dividing planned expropriations into incremental phases that, when considered individually, are insufficient to invoke preemption.

For these reasons, Morgan City's petition for panel rehearing is DENIED.

A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, rehearing en banc is DENIED.

EDITH H. JONES, Circuit Judge, with whom, JERRY E. SMITH and DeMOSS, Circuit Judges, join dissent from the Denial of Rehearing En Banc:

The panel opinion and opinion on rehearing in this case have, under the rubric of "frustration preemption," [1] approved a breathtaking federal power-grab by REA from local government units that otherwise enjoy broad eminent domain authority. Neither the REA nor its regulations contemplate preemption of this quintessential local power—the agency's regulations in fact assume the opposite.[2] That REA lacks broad preemptive authority was emphasized by the Supreme Court's rebuff of agency efforts to thwart local electrical rate regulation. *Arkansas Electric Cooperative v. Arkansas Public Service Commission*, 461 U.S. 375, 103 S.Ct. 1905, 76 L.Ed.2d 1 (1982). Surely, if state rate regulation is permitted, though it contains the power to hobble a federally financed cooperative,[3] then the eminent domain power—exercisable only on payment of just compensation—has not been overridden by statute or, even more vaguely, by a conclusional judicial stamp labelled "frustration of purpose." Because the panel opinion has given REA authority that Congress clearly denied it and that the Supreme Court, I am confident, has also withheld, I respectfully dissent from the denial of *en banc* rehearing.

---

[1] "Frustration preemption" is employed as a short-hand reference for the proposition that state law is (impliedly) preempted when, though it does not conflict with a federal statute, it would unduly frustrate the purposes of such a statute by "discouraging conduct that federal legislation specifically seeks to encourage." *Morgan City*, 31 F.3d at 322.

[2] *See* 7 C.F.R. § 1710.12(b)(5) (Administrator to account for risks "of loss of portions of borrower's service territory from annexation" in assessing likelihood that loan will be repaid.)

[3] Cajun Electric Power Co., an REA-financed supplier of electricity to SLECA and participant in this case, recently entered bankruptcy proceedings in part because of niggardly local rate regulation.

By relying on the notion of frustration preemption, the original panel opinion held that Morgan City's attempted annexation of customers from SLECA, an REA-financed rural electrical cooperative, must fail because it might impair SLECA's ability to repay REA's loans. Curiously, that opinion never cited *Arkansas Electric*, the critical Supreme Court decision concerning preemption of local regulatory authority under the Rural Electrification Act. Only in its rehearing opinion does the panel attempt to grapple with the implications of *Arkansas Electric*. To me, that case is fatal to the panel's decision.

In *Arkansas Electric*, the Supreme Court rejected an implied preemption argument nearly identical to that advanced here. REA argued that local rate regulation may "frustrate important federal interests":

> [I]n passing on rate questions, the REA considers, not only the security thus afforded for payment of the loan, but also the suitability of the rates and structure to the Act's underlying purpose of facilitating the availability of cheap electric power in rural America.
>
> . . . . .
>
> The spectre of state regulation poses a threat to the REA loan because of the possibility that the state may refuse to permit its cooperatives to pay a generation and transmission association the rates to which they agreed and upon the security of which the loan was issued. Moreover, the policy behind the Rural Electrification Act is at stake . . . [T]he REA has always encouraged its borrowers to establish affordable rates for all of its subscribers. In this way, costs are shared in a manner which, over the long run, benefits all by the creation of a sound, extensive rural electric system.

Arkansas Electric, 461 U.S. at 385-386, 103 S.Ct. at 1913 (omissions in original).

To REA's policy arguments, the Court responded, first, that, "[A]lthough the REA was expected to play a role in assisting the fledgling rural power cooperatives in setting their rate structures, *it would do so within the constraints of existing state regulatory schemes.*" *Arkansas Electric*, 461 U.S. at 386, 103 S.Ct. at 1913 (citing legislative history of 1936 Act) (emphasis added). Second, the Court noted that REA's presently published policy was inconsistent with preemption of state regulatory jurisdiction. *Id.* at 387-88, 103 S.Ct. at 1914. Third, responding to the possibility that state regulation of rates could jeopardize "the Government's interest in securing its loans," the Court observed: "The relevant inquiry, however, is not whether Congress authorized or expected such regulation, but whether it intended by its own actions to *forbid* it." *Id.* at 387 n. 11, 103 S.Ct. at 1914 n. 11 (emphasis in original).[4]

The premises of decision in *Arkansas Electric* govern the case before us. Just as the Supreme Court held that the structure of the REA implies coexistence of the agency's program with local electrical rate regulation, that same structure commands coexistence with local eminent

---

[4] *See also Commonwealth Edison v. Montana*, 453 U.S. 609, 633-34, 101 S.Ct. 2946, 2961-62, 69 L.Ed.2d 884 (1981) (rejecting that general statements of national policy can demonstrate congressional intent to pre-empt state legislation that may have an adverse impact on attainment of that policy objective). "[P]re-emption of state law by federal statute or regulation is not favored in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Id.* at 634, 101 S.Ct. at 2962 (citations omitted). "In cases such as this, it is necessary to look beyond general expressions of 'national policy' to specific federal statutes with which the state law is claimed to conflict." *Id.* Nor is this requirement limited to facial challenges. *Id.* at 633, 101 S.Ct. at 2961-62. The appellants in *Commonwealth Edison* "insist[ed] that they [we]re entitled to a hearing . . . to adduce evidence supporting their claim that the "state action" frustrates and impairs" the national policy of encouraging the use of coal." *Id.*

domain authority.[5] As in *Arkansas Electric,* no statutory provision precludes the exercise of the local expropriation power. The panel's attempt to resurrect, in the opinion on rehearing, 7 U.S.C. § 907 as a source of implied preemptive authority is simply incorrect.[6] That provision permits REA, like any lender, to prevent voluntary alienation of its collateral by the borrower; it says nothing about REA's ability to forestall *involuntary* condemnation of service territory. Under *Arkansas Electric,* local governmental units plainly retain their right to condemn REA-backed cooperatives' assets.

In their rehearing opinion, the panel has belatedly placed a fig leaf over its conflict with *Arkansas Electric,* distinguishing that case as a facial challenge to local regulation, while Morgan City's case involves an alleged actual conflict wrought by specific expropriations of SLECA's customers. As the panel observes, *Arkansas Electric* did not entirely foreclose the possibility that a particular rate may so seriously compromise federal interests, including the ability to repay loans, as to be impliedly preempted. *Id.* 461 U.S. at 389, 103 S.Ct. at 1915. For several reasons, this argument is unpersuasive. First, whether there is an actual conflict that "frustrates the ability to repay REA-backed loans" raises a factual question. Yet no hearing or trial occurred here, despite conflicting affidavits of competent experts on both sides.[7] Second, the trial court did not view this as a factual but

---

[5] *Compare City of Madison v. Bear Creek Water Ass'n.,* 816 F.2d 1057 (5th Cir.1987) (federal statute unambiguously barred annexation or condemnation.).

[6] Although the district court relied on § 907, the original panel opinion pointedly declined to do so. 31 F.3d 319.

[7] Letters by the administrator of the REA cannot suffice to ordain preemption. *Wabash Valley Power Association v. REA,* 903 F.2d 445, 453 (7th Cir.1990). ("In order to preempt state authority, the REA must establish rules for the force of law."); *Thomas v. New York,* 802 F.2d 1443 (D.C.Cir.1986) (Scalia, J.) (holding that a letter from the Administrator of the EPA does not have force of law). "We have not found any case holding that

as a purely legal dispute. *See City of Morgan City v. South Louisiana Electric*, 837 F.Supp. 194, 199 (W.D. La.1993) (review of REA's withholding approval decision under § 907 limited to "arbitrary and capricious in light of the record as a matter of law"). Third, REA's and SLECA's fears of conflict between federal and local authority are utterly hypothetical, because they predict dire domino-like consequences of future expropriations if even one be allowed to occur, and because they essentially assume that in no expropriation will local regulations adequately reimburse SLECA with just compensation. Fourth, and most tellingly, if the condemnation of 252 customers, a mere one percent of those served by SLECA, "frustrates" a federal purpose, then what exercise of eminent domain would not do so? The practical effect of the panel's decision is much broader than its self-deprecating language would suggest. Because the panel has not based its decision on a factual finding of "frustration" so much as upon a rubber-stamp of an agency conclusion,[8] the real frustration here is of the *Arkansas Electric* holding.

What particularly troubles me about this case is the panel's willingness to allow a federal lending agency to get more than its due at the expense of local sovereignty. REA claims the authority to override municipal condemnation authority because otherwise, it asserts, SLECA's operating costs may rise and may necessitate higher rates to customers and jeopardize SLECA's ability to repay its federal loans. The Seventh Circuit pointedly answered

---

a federal agency may preempt state law without either rulemaking or adjudication." *Id.*

[8] Interestingly, the Court itself sounded warning about the need to discount the REA's preferences: "All this is not to say that officials of the REA have always welcomed state regulation of rural power cooperatives, or thought it was a good idea. But, of course, such expressions of opinion do not constitute sufficient grounds for pre-emption." *Arkansas Electric*, 461 U.S. at 386 n. 10, 103 S.Ct. at 1913 n. 10 (citation omitted).

such arguments: "To the extent the REA believes that states must adopt rules of the law that always allow federal lenders to recoup their investments, it is mistaken." *Wabash Valley Power Ass'n v. REA*, 903 F.2d 445, 454 (7th Cir.1990) (citing *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979)). Further, "Congress' assumption when it created the Rural Electrification Act in 1936 seems to have been that the REA could protect itself [from this parade of horribles] by setting conditions on the extension of credit." *Wabash Valley Power Ass'n*, 903 F.2d at 453 (holding that direct, invasive regulation of state utility rates was not preempted).[9]

Even the core of the panel's opinion—preemption premised in frustration of a federal purpose—is highly problematic, rarely utilized by the Supreme Court and of dubious propriety.[10] As Judges Higginbotham, Sey-

---

[9] Judge Easterbrook also noted the economic windfall reaped by the REA by virtue of its preemption argument:

> [T]he REA made its loans and guarantees on the assumption that state regulation would apply. . . .
>
> [This] may have led to an adjustment in the interest rate, which, in turn increases the rates [the utility] charges. (If there was no adjustment, people at the REA were asleep on the job.) When the risk materialized, the REA has demanded shelter of federal law *plus* the interest rate that reflected the interest risk created by state law. Nice cushion, if you can get it.

Wabash Valley, 903 F.2d at 455.

[10] *See also* Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L.Rev. 767 (1994), who argues that the vitality of this strain of preemption hinges on confusing the Supremacy Clause and preemption. On the one hand, the supremacy of the federal law means that valid federal law overrides otherwise valid state law in cases of conflict between the two. Hence supremacy does not deprive the state of any of its preexisting concurrent lawmaking authority, but merely dictates that a particular state law in conflict with a particular federal law will be trumped in cases where both apply. Preemption, by contrast, means (a) that states are deprived of their power to act *at all* in a given area, and (b) that this is so *whether or not* state law is in conflict with federal law.

mour, Sneed, and then-Judge Starr, Justices William C. Clark and John Criswell have observed, "obstacle preemption demands a high degree of judicial policymaking." The LAW OF PREEMPTION, a Report of the Appellate Judges Conference American Bar Association at 38 (1991).

The effect of this decision must be to embolden federal lending agencies to overcome costly or inconvenient local regulations by advancing newly-minted frustration of purpose arguments in federal court. Such an extension of this type of implied preemption doctrine is an unwholesome development because it takes power away from

—Congress, which carefully described the agency's authority;

—the administrative rule-making process, which could preempt local regulation *after* allowing all affected parties to participate; and

—local, politically responsible authorities.

The panel decision transfers power to

—REA officials, without benefit of express statutory authority or regulation;

—federally financed rural electrical coops, who must be surprised at this development; [11] and

—federal judges, who have the final, delphic say in what constitutes a "frustration of purpose."

"Frustration of purpose" preemption should not be allowed drastically to expand a federal lending agency's authority where Congress expressly contemplated it would play by local regulatory rules.

I respectfully dissent.

---

[11] In an amicus brief filed with this case in October, 1993, the National Rural Electrical Cooperative Association attached a "Final Report of the Territorial Integrity Committee," which explains and complains about how many municipal annexations of members' property were occurring in the late 1980's.

APPENDIX D

IN THE UNITED STATES DISTRICT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Civil Action No. ———
Section L

JUDGE DOHERTY
MAGISTRATE JUDGE METHVIN

CITY OF MORGAN CITY,
Plaintiff

v.

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION,
Defendant,

CAJUN ELECTRIC POWER COOPERATIVE, INC.
Defendant/Intervenor

and

UNITED STATES OF AMERICA,
Third-Party Defendant.

DECLARATION OF MICHAEL F. LIU

I hereby declare under penalty of perjury that the following is true to the best of my knowledge, information, and belief.

1. My name is Michael M. F. Liu. My current title is Acting Administrator of the Rural Electrification Administration ("REA").

2. Attached is an authentic copy of the administrative decision which I made as Administrator with respect to the proposed expropriation of property of South Louisiana Electric Cooperative Association ("SLECA") by the City of Morgan City in this case.

3. Under section 7 of the Rural Electrification Act of 1936, as amended, I have determined to withhold approval of the disposition of SLECA property which is the subject of the expropriation action in this case.

/s/ Michael M. F. Liu
MICHAEL M. F. LIU

6/18/92
Date

TABLE OF CONTENTS FOR

RECOMMENDATION TO THE ADMINISTRATOR

LOUISIANA 8 TERREBONNE

LOUISIANA 30 BAYOU GT

EXPROPRIATION BY MORGAN CITY, LOUISIANA

I. Purpose ..... [38a]

II. Background ..... [38a]

A. SLECA Background ..... [38a]

B. Cajun Background ..... [41a]

1. General ..... [41a]

2. Wholesale Power Contracts ..... [42a]

3. Financial Difficulties ..... [43a]

4. Debt Restructure ..... [45a]

C. Expropriation Background ..... [47a]

D. REA Program ..... [50a]

1. Distribution Borrowers ..... [50a]

2. Power Supply Borrowers ..... [54a]

III. SLECA Impact Analysis ..... [58a]

A. Phase II ..... [58a]

1. Lost Margins ..... [60a]

2. Severance Damages ..... [60a]

3. Consequential Damages ..... [61a]

4. Expropriated Facilities ..... [61a]

B. Phase III ..... [62a]

C. Houma Expropriation ..... [63a]

D. Consolidated Impacts on SLECA ..... [64a]

E. Other Impacts ..... [65a]

IV. Cajun Impact Analysis ..... [67a]

A. Analysis of Expropriation Impacts ..... [67a]

1. Cajun Analysis of Expropriations ..... [67a]

2. REA Analysis of Expropriation ..... [69a]

B. Overall Impact on Cajun ..... [70a]

V. Summary ..... [72a]

VI. Conclusion ..... [74a]

RECOMMENDATION TO THE ADMINISTRATOR
LOUISIANA 8 TERREBONNE
LOUISIANA 30 BAYOU GT
EXPROPRIATION BY
MORGAN CITY, LOUISIANA

I. Purpose:

This memorandum analyzes the impact on South Louisiana Electric Cooperative Association ("SLECA") and Cajun Electric Power Cooperative, Inc. ("Cajun") of plans of the City of Morgan City, St. Mary Parish, Louisiana ("Morgan City"), to expropriate all of SLECA's electric distribution facilities and consumer/members within the existing City limits and to annex additional land area and expropriate additional facilities and consumers from SLECA. This recommendation also analyzes, in detail, the effects that the Morgan City and potential takings of SLECA consumer/members and facilities would have on the interests of REA, and recommends how the Administrator's discretionary approval rights under Section 7 of the Rural Electrification Act of 1936 (RE Act) be exercised.[1]

II. Background:

A. *SLECA Background*: SLECA is a distribution cooperative headquartered in Houma, Terrebonne Parish, Louisiana. It provides service in the peninsula region of the extreme southeastern portion of the State. SLECA serves the power requirements of approximately 15,000 Members in the parishes of Lafourche, Saint Martin, Saint Mary, and Terre-

---

[1] SLECA is opposing the proposed expropriation and has not sought REA approval for the expropriation. Therefore, the procedure in REA Bulletin 115-1, *Sales of Capital Assets by Electric Borrowers*, for approving capital sales are not applicable.

bonne. SLECA has a density of consumers of nearly 13 per mile of line.

Over the past 55 years, REA has financed the construction of SLECA's electric system. Since February 3, 1937, SLECA has received 25 REA loans totaling over $38,000,000 and supplemental financing from other lenders of over $12,000,000 to construct 1,108 miles of distribution line, 36 miles of transmission line, and connect over 18,000 services. The REA loans are long-term (35 years) and bear interest at subsidized rates of from 2 to 5 percent. The most recent insured/concurrent loan, designated "AD6", was approved for

SLECA on April 23, 1984, totaling $6,460,000 from REA and $2,914,000 from the National Rural Utilities Cooperative Finance Corporation ("CFC"). As of December 31, 1991, SLECA's long-term outstanding debt was $34,359,109, of which $25,184,401 is to REA and $9,174,708 to CFC. The REA loans will reach final maturity in 2014.

Per Capita Personal Income Statistics from the Bureau of Labor Statistics:

	Per Capita Personal Income 1989
United States	$17,592
Louisiana	$12,923
Lafourche Parish	$12,091
St. Martin Parish	$ 9,585
St. Mary Parish	$11,509
Terrebonne Parish	$11,641

This data shows that SLECA serves a relatively low income area compared to both the national and Louisiana statistics.

SLECA purchases all of its power requirements from Cajun through a wholesale power contract that extends through December 31, 2026.

SLECA's key financial ratios and other statistics, which have been obtained from REA's report number 168.1, *Borrower Statistical Profile* and REA Form 7, *Financial and Statistical Report* submitted to REA by SLECA for the period ending December 31, 1991, are as follows:

	SLECA Annual values			Median values U.S.	State
	1989	1990	1991	1990	1990
*TIER	1.24	1.59	1.63	2.23	1.63
*MTIER	1.21	1.55	1.55	1.97	1.59
*DSC	1.35	1.60	1.52	2.16	1.61
*MDSC	1.32	1.57	1.44	2.00	1.61
*Equity	27%	30%	32%	39%	29%
Consumers	14,699	14,854	15,047	8,248	14,149
*MWh Sale	319,800	340,110	352,130	129,750	219,840
Sales Rev/MWh	79.08	78.28	76.05	73.10	86.15

* See "Definitions" in Attachment A. The definition of "MWh" is included in the Attachment.

SLECA and the other REA borrowers in Louisiana compete with other types of electric utility enterprises for consumers. There are no certificated electric service territories, as such, in Louisiana. Thus, the relative competitiveness of SLECA's retail rates is important to SLECA's financial health. In addition to Morgan City and the City of Houma Electric System ("Houma"), SLECA competes with the following Louisiana investor owned utilities:

Central Louisiana Electric Company ("CLECO") and Louisiana Power and Light ("LP&L").

SLECA has provided REA a summary showing the disparity in residential consumer electric service bills among the electric utilities in Louisiana as of April 1992. The summary shows SLECA's average residential revenue per 1000 kWh sold was $76. That bill amount was 27 percent higher than CLECO's, 7 percent higher than LP&L's, 15 percent higher

than Morgan City's, and 1 percent higher than Houma's.

B. *Cajun Background*:

1. *General*: Cajun is a nonprofit generation and transmission cooperative association, incorporated under the laws of the State of Louisiana and comprised of 13 distribution cooperatives ("Members"), including SLECA. Each Member is represented on Cajun's Board of Directors. Cajun supplies wholesale electric power to each of its Members pursuant to an all requirements wholesale power contract with each Member, requiring that the Member buy all of its power from Cajun. Cajun also sells wholesale electric power to other utilities and municipalities which are not Members. The Members are located in Louisiana and provide retail electric power to customers in most of the Parishes in Louisiana.

Cajun is headquartered in Baton Rouge, Louisiana. Cajun was originally organized in 1960, as the Louisiana Electric Cooperative, Inc. (LEC), and in July of 1962, was chartered by the State of Louisiana and incorporated with the objective of assuring member cooperatives a reliable supply of electric power at as low a cost as practicable. In January 1972, LEC changed its name to Cajun Electric Power Cooperative, Inc. (Cajun).

As of December 31, 1991, the Cajun Members served approximately 337,000 metered customers representing over one million people. Members' energy sales in 1991 totaled approximately 5,337,000 MWh, of which approximately 74 percent were to residential customers.

Cajun initially met its Members power requirements by purchasing wholesale electric power from other sources. Uitimately, Cajun and its Members determined that it would be in the Members' best interest to own generating units.

Substantially all of Cajun's capital financial needs have been met through REA programs. Cajun has obtained direct loans and loan guarantees from REA, and, as of January 1, 1992, Cajun's total debt obligation to the United States was in excess of $3.5 billion. Cajun has encountered severe financial difficulties and REA has restructured Cajun debt as discussed in more detail in Sections 3 and 4 below.

2. *Wholesale Power Contracts*: Cajun derived 72 percent of its revenue in 1991 from the wholesale power contracts with its Members. The wholesale power contracts between Cajun and each of its Members provides that Cajun shall sell and deliver to each Member, and each Member shall buy and receive from Cajun, all of the Member's power and energy requirements. The wholesale power contracts, as amended, extend through December 31, 2026. The Members have contracted not to enter into any separate wholesale power contracts or arrange for a supply of any power without the approval of Cajun and REA.

As noted above, sales to Members comprised 72 percent of Cajun's revenue in 1991. Cajun has considerable excess generation capacity and the capability to interchange capacity and energy with utilities in several states in the southern region of the United States. However, the price of capacity and energy which is generally available for sale from other utilities in the region is more competitively priced than the cost to

Cajun to generate and transmit comparable capacity and energy outside its system to purchasing utilities. Cajun is unable at this time to sell very much of its excess capacity and energy. This situation is not expected to improve substantially in the immediate future. Member sales will continue to be the foundation of Cajun's capacity and energy sales and Cajun's viability is directly dependent upon such sales.

Because of Cajun's disadvantaged position in the excess power market in the southern region, it is basically unable to recover the carrying costs of its investment in such excess capacity from either its Members or through non-Member sales. As a result, Cajun experienced severe financial difficulties, which ultimately led to REA restructuring Cajun's financial obligations.

3. *Financial Difficulties*: Cajun has experienced serious financial difficulties which resulted in its inability to make all required debt service payments to REA. Cajun first defaulted on its payments to REA in 1987. Prior to reaching an agreement with REA restructuring its payment obligations, Cajun defaulted on payments amounting to over $427 million. If REA had not agreed to restructure Cajun's payment obligations, Cajun's defaulted payments would amount to over $890 million today.

Cajun's financial difficulties have been caused by several factors. The first is the failure of load growth to reach the levels anticipated during Cajun's building phase. Cajun had built generating units during the last decade which can annually generate over 10,000 GWh. Cajun's energy requirements were based on an anticipated annual load growth of over 9 percent. Instead of experiencing 9 percent annual

load growth, Cajun's growth has been significantly less. During the last 4 years Cajun has experienced annual load growth of about 1.5 percent. As stated above, the Cajun Members' energy load in 1991 was approximately 5,337 GWh in 1991, resulting in approximately 5,000 GWh in excess energy.

The failure to achieve anticipated load growth has obviously had a detrimental effect on Cajun's revenue and has contributed to Cajun's need to increase the rate it charged its Members. Cajun's wholesale rates to its Members reached a peak in 1986 of approximately 65 mills per kWh, or 6.5 cents/kWh. The Louisiana economy, however, was such that the Membership of Cajun could not support such a level of wholesale rates.

Furthermore a large disparity existed between the wholesale power rates charged by Cajun and those charged by Cajun's competitors. This rate disparity made Cajun uncompetitive, further jeopardizing Cajun's economic position. A comparison of Cajun's wholesale electric rates from *Financial Statistics of Selected Utilities* for years 1985 through 1991 and those charged by its competitors are as follows:

Louisiana Firm Power Sales

Mills/KWH 1985-1991

	1985	1986	1987	1988	1989	1990	1991
Cajun	63.7	64.9	60.1	53.5	53.5	54.4	52.5
CLECO	44.7	35.9	31.1	32.4	40.4	45.8	46.2
GSU	NA	50.9	50.5	57.7	58.4	46.0	42.5
LP&L	34.4	36.2	33.8	35.8	37.6	36.3	37.4*
NOPSI	NA	25.8	25.3	27.2	28.3	28.5	29.2*
SWEPCO	38.9	35.4	26.9	24.4	21.8	19.3	20.1*

* = Estimate

Note: GSU and NOPSI 1985 data not available

4. *Debt Restructure*: Since 1987, when Cajun defaulted on its REA debt, REA has worked with Cajun to avoid Cajun's bankruptcy. After long and difficult negotiations, REA and Cajun were successful in concluding a Debt Restructure Agreement (DRA) on May 31, 1990. The DRA restructured Cajun's total REA debt, direct and guaranteed, into two notes containing different repayment terms.

Seventy percent (70%) of the Cajun debt outstanding on May 30, 1991, totaling $2,147,994,670, is evidenced by "Note A." "Note A" has a fixed debt service schedule which requires specified payments to REA in an amount which for many years is significantly less than what would otherwise have been due to REA. At the time of its default in 1987, Cajun's annual debt service payment was approximately $300 million. REA, as specified in "Note A," has agreed to accept a payment schedule substantially reducing Cajun's current annual debt service payments. For example, the "Note A" payment schedule provides for a payment of $120 million in 1992.

Thirty percent (30%) of the Cajun debt outstanding on May 30, 1991, totaling $1,037,007,550, is evidenced by "Note B." "Note B" represents a contingent payment obligation until the final maturity date in 2036, when all unpaid amounts become due. Until the maturity date, payments must be made on "Note B" only if certain revenue-generating events occur, such as load growth. It has been specifically agreed that "Note B" payments are required to be made by Cajun when Cajun's actual Member sales on an accumulated basis exceed those levels established in the DRA.

Cajun's sales during the 2 years following the effective date of the DRA have been greater than the threshold amount of sales above which Cajun must make payments due to REA under Note B. Consequently, REA has received some payments under Note B. Any loss of load currently served by the SLECA system in the areas proposed to be expropriated would reduce directly the amount of payments REA is entitled to receive under the Note B.

The DRA includes major financial concessions by REA. Cajun's current debt service payments have been reduced to a little more than one third of what they were prior to the DRA. While Cajun is making these drastically-reduced debt service payments to REA, REA is fully honoring its guarantee of Cajun's debt to other lenders. Over 98 percent of Cajun's outstanding long-term debt was borrowed from the Federal Financial Bank (FFB)[2] and the National Bank for Cooperatives (CoBank), backed by REA guarantees. REA, as guarantor of this debt, is paying the difference between Cajun's restructured debt service payments and the debt service payments agreed to originally by Cajun and its lenders. REA's payments on behalf of Cajun represent a present outflow of federal funds which may never be recouped if circumstances in Louisiana further deteriorate.

Because of REA's concessions under the DRA, Cajun was able to reduce its wholesale rates. Cajun's average rates to the Members have been the following over the last 5 years:

---

[2] A significant percent of FFB debt has been refinanced. The repayment of such debt is guaranteed by REA.

	Average Rate To Members (mills/kWh)
1987	60.66
1988	53.52
1989	53.47
1990	54.50
1991	52.46

REA's concessions have enabled Cajun to charge rates which are supportable by the Louisiana economy, and which reduce the rate disparity between Cajun's Members and competing utilities. The purpose of this effort is to maintain the viability of the cooperative system in Louisiana while recouping the REA's investment in developing that system.

C. *Expropriation Background*: Morgan City initiated efforts in 1986 through correspondence with SLECA to acquire consumers in a newly annexed area, since referred to as Phase II of a long-range annexation plan. Morgan City has a plan composed of Phase I, Phase II, and Phase III to enlarge its municipal boundary by annexing additional land and to expropriate all of SLECA's electric distribution facilities within the resulting boundaries. Morgan City is located in the Parish of St. Mary, approximately 30 miles west of Houma, Louisiana, where SLECA is headquartered. Phase I of Morgan City's plan has been implemented. That phase did not involve any of SLECA's system's facilities.

In Phase II, Morgan City seeks to take all of SLECA's facilities, including poles, transformers, power switches, and other equipment, located in the area annexed in 1986, as well as the right to serve approximately 260 existing electric consumers who are presently purchasing power from SLECA, and all future consumers located within that area. The por-

tion of SLECA's system which Morgan City proposes to take in Phase II has a density of consumers of about 34 per mile of line in comparison to the system average density of consumers of about 13 per mile of line. If Phase III takes place, it could result in the taking from SLECA of approximately 270 additional electric consumers and related facilities, and service rights to future consumers, being lost by SLECA. Electric service within the Phase II area was initially provided by SLECA as part of the REA loan program and all the property sought by Morgan City was financed with long-term REA loans at subsidized interest rates of from 2 to 5 percent.

In 1987, SLECA sent a letter to Morgan City describing the adverse effects that the Phase II acquisition would have on the remaining SLECA system's members. Morgan City made repeated offers to SLECA during the next 2 years. Morgan City's final offer for the Phase II acquisition was made May 15, 1989, totaling approximately $896,000, as follows:

2½ X Annual Gross Revenue	$735,000
Value of Facilities	$161,000
Total	$896,000

Morgan City proposed to make payments annually over an 8-year period of approximately $112,000 per year. SLECA has not made a counter offer to Morgan City because it wants to retain the consumers Morgan City proposes to expropriate.

On August 3, 1990, Morgan City filed an expropriation, or condemnation, proceeding against SLECA in state court. This legal proceeding involves only Phase II of Morgan City's plan. However, SLECA is concerned that the Morgan City action is not isolated but part of a growing trend by municipalities to acquire the more lucrative portion of SLECA's or other REA borrowers' systems.

REA analyzed the effects of the proposed takings on SLECA, Cajun and REA interests. REA's preliminary assessment combined Phases II and III, and also considered the possibility of the threatened expropriation by the City of Houma, which has indicated an interest in acquiring SLECA's consumers and facilities within its city limits. A copy of the preliminary analysis prepared by the Financial Services Staff to determine the effect the expropriations could have on Cajun is attached as Attachment B. The preliminary analysis indicated that in 1992 the combined Morgan City Phases II and III expropriations would result in gross lost revenue from SLECA of $768,000 annually and net lost revenue of $535,000 annually to Cajun.

The preliminary analysis for the loss in 1992 of consumers in the City of Houma showed a gross revenue loss of $882,000 annually and a net loss of $615,000 annually to Cajun. The combined total forecasted lost revenues for Morgan City Phases II and III, and the City of Houma, in 1993, would be gross revenue loss of $1,650,000 annually and net loss revenue of $1,150,000 annually to Cajun.

In the initial REA analysis it was also recognized that in addition to the impact that the expropriations would have upon SLECA and Cajun, there would also be an impact upon the other 12 distribution member systems of Cajun. In light of Cajun's excess generating capacity and precarious financial position, one of REA's major concerns is the effect that the loss of existing consumers and service rights in the targeted areas on rates and financial stability of SLECA, Cajun, Cajun's other Members and on REA's loan program in Louisiana. REA determined, based upon the preliminary analysis by REA staff, that SLECA's, Cajun's, Cajun's other Members' and REA's interests would be adversely effected, and that

the Administrator should strongly consider withholding approval of the disposition of property under Section 7 of the RE Act. (see *"REA Program"* below). This recommendation sets forth in greater detail than the preliminary analysis, the impact of the proposed expropriation and considers additional information provided subsequent to the preliminary analysis.

D. *REA Program*: The expropriations must be evaluated from the perspective of their impact on the objectives of the REA Program, the structure adopted by REA to carry out the Program, and the feasibility of and security for REA loans and/or loan guarantees to SLECA, Cajun, and to other Cajun Members. Congress established REA, and authorized the Administrator to provide long-term low interest rate loans to accomplish the objective of providing reliable electric service at affordable costs in rural areas at a time when existing utilities were refusing to provide service in many rural areas. REA borrowers are organized in a unique corporate and financial structure specifically designed to carry out the RE Act objectives in the most cost effective manner in order to bring out the benefits of rural electrification to as many people as possible.

1. *Distribution Borrowers*: With scattered exceptions, REA distribution borrowers are member-owned, not-for-profit cooperatives organized to provide electric service to qualified persons within their service areas. Through their electric bills, Members pay for the cost of electric service and contribute additional amounts to be used by the cooperative as equity capital. The cooperative allocates the additional amounts to the Members and normally returns contributed capital to its Members periodically, provided it meets certain requirements identified in its mort-

gage with REA. Members do not receive an economic return (e.g., interest or dividends) on equity capital. Rather, the cooperative's ability to utilize member equity contributions "free" allows the Members to benefit through lower rates of electricity.

Central to the goal of the REA program are the principles that electric service will be provided to the widest number of consumers possible, and that the costs and benefits of service will, to the extent practicable, be shared by all Members on the same basis. The organizational structure of the cooperatives and the financial policies of the REA are designed to further those principles. REA approves loans to serve new consumers based on the economics of the borrower's entire service area, including yet undeveloped areas, not just the economics of the new consumers. REA requires, as a term of the loan, that each borrower practice area coverage. Area coverage is the concept whereby a borrower extends electric service to all unserved persons within its service area who meet all reasonable requirements, and that, to the maximum extent practicable, such service be provided to all consumers at the same rates and minimum charges. See 7 C.F.R. 1710.103. As noted in Harl's treatise on *Agricultural Law*:

> "The significance of the area coverage principle is seen from the fact that the RE Act was in large part a reaction against policies of certain power companies in the 1930's to skim off the cream of the electric business in the more densely populated areas and to leave the remote areas without service. This resulted from their considering the

> economic feasibility of each service extension on its own, whereas the REA area coverage concept was to consider economics of service to the entire area without testing each extension separately." 98.02[17](d)(iv), 1984.

The cooperative structure and the area coverage requirement are designed to ensure that all consumers share equally in the costs and benefits of the program for rural electrification, and that the greatest number of rural consumers receive electric service at affordable rates. The rates charged to customers in sparsely populated areas are the same as those in more densely populated areas. The members in low density areas benefit from revenues received from members in higher density areas where costs of service are lower. In time, some of the lower density areas increase in density to the extent that they, in turn, provide benefits to remaining low density areas. The success of this structure depends on the ability of the borrower to continue to serve the densely populated areas of the system—frequently those adjacent to or incorporated into municipalities—which provide greatest returns.

The RE Act imposes on the Administrator the duty to determine that each loan is "feasible" and that "loan security" is reasonably adequate. In addition, REA has been directed by Congress to improve the financial strength of the borrowers. Legislation amending the Act in 1973 provided, in part:

> "It is hereby declared to be the policy of Congress that . . . such rural electric and telephone systems should be encouraged and assisted to develop their resources and

> ability to achieve the financial strength needed to enable them to satisfy their credit needs from their own financial organizations and other sources at reasonable rates and terms consistent with the loan applicant's ability to pay and achievement of the Act's objectives." [May 11, 1973, P.L. 93-32, Sec. 1, 87 Stat. 65, 7 U.S.C. 930]

REA has sought to ensure feasibility and security, and to improve the financial strength of its borrowers, by taking a lien on each borrower's system and by closely regulating the construction and operation of the system. By the terms and conditions of its loans, REA retains approval rights over additions and extensions to the system, the manner of construction and maintenance of the system, key contracts relating to the construction and operation of the system, and the acquisition and disposition of property. In most cases, REA requires distribution borrowers to meet a TIER of not less than 1.5 and a DSC ratio of not less than 1.25. TIER and DSC requirements are set forth in the mortgage, loan contract or other contractual agreements with REA. These financial tests are designed to help develop equity, and hence financial strength, and to qualify the REA borrowers for private market financing.

In addition to directing the Administrator to establish loan terms and conditions, the RE Act explicitly provides in Section 7 that "No borrower of funds . . . shall, without the approval of the Administrator, sell or dispose of its property, rights, or franchises, acquired under the provisions of this Act, until any loan obtained from the Rural Electrification Administration, including all interest and charges, shall

have been repaid." In regulating the borrower's transactions pursuant to the terms and conditions of the loans or Section 7, the Administrator must consider the impact of the transaction on feasibility, security, the development of borrower's financial strength, as well as the objectives of the RE Act. In general, loss of high density and future high growth service territory can adversely affect all of these factors.

2. *Power Supply Borrowers*: Power supply borrowers are not-for-profit cooperatives providing wholesale electric service to their member/owners, the distribution cooperatives. Like the distribution borrowers, power supply borrowers have been structured to achieve RE Act purposes of providing affordable electric power to RE Act beneficiaries. REA provides financial assistance to power supply borrowers to construct facilities to meet the needs of RE Act beneficiaries, the consumers served by its distribution Members. REA evaluates requests for financial assistance to power supply borrowers in much the same manner as it does with distribution borrowers, considering the economics of the entire area served by the power supply borrower (i.e., the service territories of all distribution Members). REA will approve the financial assistance to power supply borrowers only if it determines that the proposed facilities constitute the most effective and economical means of meeting the power requirements of RE Act beneficiaries. See 7 C.F.R. 1710.254(a)(ii)(2).

The distribution borrowers are equity owners of a power supply borrower and are tied to their power supplier by a long-term all-requirements wholesale power contract required by REA.

The contract provides that the power supply borrower shall sell, and the member shall purchase, power at rates which are sufficient to meet the power supply borrower's costs, including repayment of REA loans and other debt coverage requirements. The wholesale power contracts provide that the Board of Directors of the power supply borrower shall establish rates so as to produce revenues sufficient, but only sufficient, the costs of operation and maintenance of all generation, transmission, and related facilities, the costs of power and energy purchased for sale by power supplier, to pay the cost of transmission services, and interest and principal on all indebtedness of the power supplier, and to provide for the establishment and maintenance of reasonable reserves. The wholesale power contracts obligate the Board of Directors, made up of representatives of each distribution Member, to review the rates at least annually and to revise them as necessary in order to produce the necessary revenues described above. The contracts provide that no revision in rates is effective unless approved in writing by the Administrator. These contracts ensure that all distribution borrowers and, ultimately, the rural consumers/owners, share the costs and benefits of the operations of the power supply borrower.

The wholesale power contracts are pledged to the REA as security for loans and form the basis for the Administrator's determinations of feasibility and security. Unlike investor-owned utilities, and largely as a by-product of the policy that rates be kept as low as possible through the not-for-profit structure, power supply borrowers have almost no equity to offer as security for

loans. As of December 31, 1990, the equity for all power supply borrowers nationwide represented only 8.05 percent of their total assets. (Informational Publication 201-1, p. xxix.) By comparison, investor-owned utilities, which combine the functions of distribution and power supply borrowers, have equity equalling 42.9 percent of their total assets. (Edison Electric Institute, Advance Release of Data for the 1991 Statistical Yearbook of the Electric Utility Industry, at p. 24.) In light of the objective of providing power at as low a cost as practicable, REA has generally, in the past, not required that such equity be developed and maintained by power supply borrowers. Rather, REA created a structure, implemented by the all-requirement wholesale power contract, that permitted REA to view the financial strength of the power supplier and all of its Members as an integrated whole. Any dilution of this whole has an adverse impact on not only the distribution systems, but on the wholesale power supplier also. REA has recently adopted a policy that requires power supply borrowers, as a condition for obtaining financial assistance through a loan or guarantee from REA, unless REA determines otherwise on a case by case basis, to develop a plan to increase equity towards meeting a minimum Equity Ratio (see definition) of 20 percent. See 7 C.F.R. 1710.116.

Thus, the success of the power supply structure, both in terms of providing low cost electric power and maintaining loan feasibility and security, depends on the financial strength of the distribution borrowers, and in particular on their ability to develop and maintain the loads necessary to generate sufficient revenues. Where the

power supply borrower has a surplus of generating capacity, loss of load clearly adversely affects the financial health of the entire integrated system, and the ability of that system to carry out the RE Act objectives. As a consequence, it is appropriate for REA, in exercising approval rights with respect to a distribution system, including in connection with the disposition of property or territorial service rights, to take into account the impact of the action not only on the distribution borrower, but also its power supplier and the other distribution borrowers that are part of the integrated power supply system.

The Administrator's findings of feasibility and security for a loan to a power supply borrower like Cajun must deal with the inherent difficulties of the electric generation industry in forecasting future needs. The planning horizon for adding new "base load" generation takes 8 to 10 years from identification of the need for new generation to the commercial availability of that generation. Systems like SLECA project their future needs, and although sophisticated econometric modeling is used to make these forecasts, such modeling cannot predict the impact of the loss of future loads through annexations and expropriations. Systems like SLECA and Cajun must plan and be ready to serve future loads at all times. During economically depressed times, the load growth and accompanying revenue do not materialize to amortize the debt incurred to build the generation that was originally projected to be required. As discussed above, this is why Cajun's debt had to be restructured.

When the loss of undeveloped electric service territory happens as a result of annexations, it

further compounds the problem both in the short term and more importantly in the long term.

When kWh sales do not materialize, the existing consumers must shoulder more of the fixed cost of the generation through increased rates. Because of the present non-competitive position of SLECA, such an eventuality leads to a further decline in usage thereby exacerbating the present non-competitive position of SLECA.

III. SLECA Impact Analysis:

Cajun and SLECA, individually, were asked by REA to prepare an analysis of the impact of the purportedly proposed expropriations on its system, and to provide such analyses to REA for its consideration.

A. *Phase II*: SLECA engaged GDS Associates, Inc., (GDS) of Marietta, Georgia, to develop a financial impact model to study the impact of losing the service territory, including the consumers and facilities that Morgan City would be expropriating under Phase II of its plan. GDS prepared a report *IMPACT OF MORGAN CITY PROPOSED EXPROPRIATION, AND FUTURE POTENTIAL EXPROPRIATIONS*, dated October 14, 1991. A copy of the report is attached as Attachment C. We have reviewed the study and have concluded that the methodology used to analyze the impacts is a valid means of measuring impacts. We have reviewed the underlying data, and it appears to be appropriate. Nothing has come to our attention to suggest that data is not valid and accurate.

GDS studied the impact of losing the expropriated area for the test year August 1989 through July 1990 ("Test Year"). The results of the study indicate that although the 252 lost consumers would represent 1.7 percent of SLECA's

total 14,828 consumers, 1.54 percent of total system kWh sales, and 1.65 percent of total system revenues, the expropriated area would result in loss of $63,106 (25.12 percent) of the system operating margins and $73,563 (13.31 percent) of total system margins. This is because the expropriation is of SLECA's highest density and high margin producing service area, "skimming the cream" from SLECA's system. In addition, the study of the Test Year indicates that the total system TIER, including the area to be expropriated, is 1.26; the total system TIER *not* including the area is 1.22. The TIER for the Test Year for the expropriated area is calculated by the GDS study to be 3.98.

The loss of the high margin-producing cooperative Members in the expropriated area would have an adverse financial effect on the system, and would place an additional financial burden on the remainder of the SLECA Members. The loss of margins produced by the lost consumers would have to be compensated for by the remaining SLECA consumers. SLECA would be required to raise its retail rates to meet the requirements of the mortgage to maintain minimum TIER of 1.5 required by REA.

GDS also prepared a supplemental study dated May 11, 1992, to the original study, attached as Attachment D, which combines financial data from the original GDS study with findings from a study prepared for Cajun by Southern Engineering Company of Atlanta, Georgia (Southern Engineering). The supplemental study also includes other costs and damages to SLECA. The supplemental study provides information concerning projected financial impacts on both SLECA and Cajun. The supplemental study

indicates the total accumulated loss to SLECA based upon the Test Year data due to Phase II expropriation would be as follows:

1991	1992	1997	2000	2010	2020
$653,605	$722,482	$1,020,684	$1,167,650	$1,527,627	$1,748,623

The above total accumulated 1991 figure of $653,605 was derived from the lost margins of $72,321 plus Severance Damages of $289,925 plus Consequential Damages of $14,097 plus the Expropriated Facilities of $277,262. A general discussion of how the above figures were obtained follows in paragraphs 1 through 4 below. A copy of the assumptions and associated calculations are attached as Attachment E titled *VALUATION OF DAMAGES FROM PROPOSED EXPROPRIATION OF CONSUMERS AND FACILITIES IN MORGAN CITY* dated March 20, 1991.

1. *Lost Margins*: The lost margins for the Test Year were obtained from revenue less costs associated with service plus non-operating margins. The revenue was computed from actual sales to the Phase II consumers during the Test Year. The expenses were allocated by various methods including ratios of plant serving the Phase II consumers to Total Utility Plant, Phase II consumers to total consumers and actual power usage by the Phase II consumers. (See Schedule 6 in Attachment E).

2. *Severance Damages*: The severance damages were computed using the original investment in the facilities associated with the Phase II area times an annual carrying charge, which was based on a sum of the carrying costs as a percent of Total Utility Plant for the Test Year. The annual carrying charge was then multiplied by the number of years remaining before capital improvement on the subject facilities was neces-

sary. This total was then discounted at a discount rate, computed using a ratio of total net margins plus interest divided by net rate base (5.66 percent), to arrive at a discounted present value of facilities in the Phase II expropriation. (See schedule 9 in Attachment E).

3. *Consequential Damages*: Consequential Damages consist of the cost associated with the reintegration of SLECA's system after the expropriation. Reintegration is the actual disconnection of the portion of the system which has been expropriated and the rehabilitation of the remainder of system after disconnection to keep the system operating properly. The costs associated with this may include, for example, disconnection and rerouting of lines, construction of new tie lines, substation modifications and labor costs.

4. *Expropriated Facilities*: The value of the Expropriated Facilities was determined by the depreciated book value of the physical facilities associated with Phase II as of July 31, 1990. This was determined by an inventory of the facilities in Phase II by Brooks-Harbour and Associates, Inc. Brooks-Harbour and Associates, Inc., of Baton Rouge, Louisiana, is a consulting firm which was hired to inventory the facilities and determine replacement cost new less depreciation as of July 31. 1990.

To arrive at the Total Accumulated loss for the future years in the Supplemental Study, the Lost Margins were discounted at a rate of 5 percent, which was stated to be a preliminary discount rate and subject to change based upon assumptions utilized in final valuation, for a period of 45 years to obtain the net present value of the lost margins. This was then added to the Total

Accumulated loss of the previous year. It should be noted that the accumulated loss figures consider just the present value of the margins lost in the Test Year. There is no consideration for loss of potential load growth in the area. While we believe that the loss of potential load growth must not be ignored by REA in evaluating impacts, we do not believe it is necessary in this case to attempt to project such losses. Also, the 45 year forecast period used in the Supplemental Study was determined by the years remaining in a franchise agreement SLECA has in the parish of St. Mary. The same methodology was used in calculating total accumulated lost revenues for Phase III and Houma City.

B. *Phase III*: If Morgan City were successful in acquiring the Phase II consumers, the cooperative's distribution lines serving the remainder of the Morgan City area in the Test Year would then serve 267 consumer/members. Exhibit 1 attached to the original GDS study is a map which indicates that Morgan City has a 3-phase plan of expropriation. The GDS study assumes that there is a strong possibility that Morgan City would also attempt to expropriate these SLECA Members. (Phase III). The study states that the assumption is based on statements by an expert witness for Morgan City (Mr. Beard), and that he testified in a deposition that Morgan City would likely attempt to expropriate these consumers. The study prepared by GDS indicates for the Test Year that if Morgan City were successful in expropriating the Phase III territory and consumers on SLECA's Morgan City distribution lines, the total system TIER including the Phase III expropriated area would be 1.26; TIER would be 1.21 not including the area. The TIER for the expropriated area serving the approximately 267 consumers is 5.26.

The supplemental study indicates the total accumulated loss to SLECA based upon the Test Year data due to Phase III expropriation would be as follows:

1991	1992	1997	2000	2010	2020
$662,977	$764,345	$1,203,213	$1,419,505	$1,949,290	$2,274,532

C. *Houma Expropriation*: SLECA is also concerned that the Morgan City taking is not isolated, that Morgan City and other municipalities may in the future attempt to take the more lucrative electric service areas and rights and consumer/members served by SLECA and other REA borrowers. The GDS study analyzes the strong possibility that Houma will expand its City limits and also attempt to expropriate SLECA Members within its City limits. The study states that the assumption is based on public statements by City officials, including the Mayor, that Houma would like to acquire these SLECA consumers. Thus, the study also estimates the impact of loss of service area and consumers to the City of Houma municipal electric system.

GDS studied the impact of potential expropriation of the Houma area containing 602 consumers during the Test Year. The results of the study indicate that although the lost consumers would represent 4.06 percent of the total number of consumers, 3.81 percent of total system KWh sales, and 3.67 percent of total system revenues, the expropriated area would result in the loss of 25.86 percent of system operating margins and 14.44 percent of total margins. As with Morgan City's proposed expropriation, this is because Houma plans to take the most efficient and profitable service areas. In addition, the study indicates that the total system TIER including the expropriated area is 1.26, and 1.22 not including the area. The TIER for the expropriated area is 2.41.

The supplemental study indicates the total accumulated loss to SLECA based upon the Test Year data due to a Houma city expropriation area would be as follows:

1991	1992	1997	2000	2010	2020
$1,987,221	$2,060,515	$2,377,841	$2,534,232	$2,917,295	$3,152,463

D. *Consolidated Impacts on SLECA*: The cumulative results of the GDS study of the consolidated Morgan City and Houma service areas, including the areas being expropriated now and the areas for which future expropriation may be planned, for the Test Year indicate that although the 1,121 lost consumers would represent 7.56 percent of SLECA's total 14,828 consumers, 7.05 percent of total system kWh sales, and 7.20 percent of total system revenues, the expropriated areas would result in loss of $221,744 (88.26 percent) of the system operating margins and $260,946 (47.21 percent) of total system margins.

The density of consumers in the expropriated areas is very high relative to the remainder of the system. Because of the relatively low level of plant investment required to serve these consumers, the related fixed costs are also low, which accounts for the high level of margins by the 1,121 consumers. The study indicates that these consumers produce a TIER of 3.46 compared to the system total of 1.26 and that their loss in the Test Year reduces the system TIER from 1.26 to 1.13. Without these consumers, SLECA would have to increase rates to the remainder of the consumers to make up the shortfall in margins to attempt to maintain financial integrity and TIER requirements imposed by REA and other SLECA lenders.

The mortgage establishes a minimum TIER of 1.50. REA encourages its borrowers to establish targeted TIER goals greater than 1.5 so that, given certain unforeseen increases in expenses, a borrower's system

will not encounter problems with its lenders under the mortgage.

The mortgage requires that borrowers maintain a DSC level above 1.25. Any borrower operating at a DSC of less than 1.25 faces problems pursuant to the provisions of the REA mortgage, and must, at a minimum take corrective action.

In addition to the loss of margins, the GDS study reflects the effects of the related reduction in revenues, and the increase in Cajun's wholesale power costs due to the loss of the 1,121 consumers. The study concludes that there might not be a material reduction in operating costs should those consumers be lost from the system. GDS reached this conclusion based upon the assumption that the incremental cost of servicing the highly populated expropriated areas is not nearly as high as that of the remainder of the system. In that case, the remaining consumers would have to pay higher rates to make up for the shortfall in revenues to pay the costs of operation and maintenance. The GDS study indicates that the continuing loss of consumers from successive expropriations would increase the revenue requirements from the other consumers, also leading to increasing rate levels. GDS reached this conclusion based upon a finding that a large portion of SLECA's operating costs (excluding wholesale power costs) are fixed and do not vary with the number of consumers served or KWh sold and that the consumers remaining on the SLECA system would have to pay a higher portion of the fixed costs.

E. *Other Impacts*: The GDS study states that in addition to the adverse impact to the financial integrity of the SLECA system as indicated for the Test Year, the expropriations would have the following additional adverse effects on SLECA:

1. *Loss of revenue growth in future years from the existing consumers.* Due to its Test Year and capitalization methodology for calculating damages, it assumes no load growth. If those consumers experience load growth, the impact will be significantly greater. Since the expropriation would occur in densely populated residential portions of SLECA's territory, it is most likely that load growth in those territories will be higher than in the remainder of the system. SLECA has been impaired by the economic downturn. When an improved local economy occurs, it is likely that the densely-populated portions of SLECA's system would produce higher usage kilowatt-hour sales levels, thus producing additional margins for the SLECA system.

2. *Uncertainty of planning for SLECA's service area, which would lead to uncertainty in the quality and reliability of service.* Planning for an electric service area can be frustrating in the absence of certainty as to the area to be served. Unless SLECA is certain of its service area, it would be unable to project the total number of consumers, the anticipated load demand on its system, and the kilowatt-hour sales. Furthermore, this uncertainty would lead to higher risks of loss when system improvements must be added to the distribution system. This uncertainty also impacts Cajun's ability to plan for future load growth.

3. *SLECA's wholesale power cost could be expected to increase.* SLECA's wholesale power costs from Cajun could be expected to increase as a direct result of the loss of consumers. This is because Cajun has excess generating capacity,

and has been unable to market the excess at prices equal to the wholesale rates charged to SLECA. Thus, the loss of consumers would result directly in reduced demand and energy, and reduce recovery by Cajun of its operating costs. This would result in Cajun increasing rates charged to SLECA and the other Cajun Members.

IV. Cajun Impact Analysis:

A. *Analysis of Expropriation Impacts:*

SLECA, with annual sales of 365,000 MWh, represents approximately 7 percent of Cajun's total Member sales of approximately 5.34 GWh, and produces approximately 4.4 percent of Cajun's Member revenues.

1. *Cajun Analysis of Expropriations:*

Cajun engaged Southern Engineering Company of Atlanta, Georgia (Southern Engineering) to develop a financial impact model to study the impact of losing the service territory, facilities and right to serve the consumers that Morgan City would be expropriating under Phases II of its plan. Southern Engineering prepared a report, *REPORT ON THE IMPACT OF THE EXPROPRIATION OF THE CITY OF MORGAN CITY, LOUISIANA AND THE HOUMA AREA ON CAJUN ELECTRIC POWER COOPERATIVE, INC.*, dated November 1991. A copy of the report is attached as Attachment F. We have reviewed the study and have concluded that the methodology used to analyze the impacts represent a valid and reasonable methodology for measuring the impacts.

Southern Engineering's study concluded that through the term of the study (end of year

2020) the net present value of Phase II lost revenues would exceed $2.6 million and total nonfuel revenue (i.e., revenue collected for Cajun's wholesale costs less the fuel cost component of operation of generation facilities) lost would be over $8 million. This amount was obtained by forecasting the lost amount of revenue to Cajun derived from the Phase II area by forecasting rates while leaving the amount of demand and energy required by SLECA to serve this area at its 1991 level. Any load growth that would be experienced would cause this value to be significantly higher. REA has reviewed the numbers that were used in this forecast and conclude that the numbers, except for the lack of load growth, are reasonable. REA believes that load growth for the expropriated consumers will occur, thus the impact is understated.

If Morgan City were successful in acquiring the Phase II consumers, it is likely the City would begin proceedings to take the area identified as Phase III of the expropriation plans. The loss experienced as a result of the subsequent taking was also analyzed by Southern Engineering. They found that the net present value of Phase III lost revenue totaled nearly $2.65 million and total lost nonfuel revenue would exceed $8 million through 2020. Like the Phase II analysis, the Phase III analysis did not attempt to quantify the effect of possible load growth. Therefore, other than the load growth assumption, REA finds that the resultant amounts are reasonable.

Southern Engineering also attempted to quantify the effect on Cajun's revenue of a taking of an area around the City of Houma that contains

602 of SLECA's consumers. The resulting loss experienced by Cajun as a result of this taking amounted to $7.5 million on a net present value basis and a total of over $23 million in lost nonfuel revenues through 2020. As with previous analysis, Southern Engineering did not model load growth, so we again disagree with only that premise of their study and find the rest to be reasonable.

In aggregate, the cumulative results of the Southern Engineering study of the consolidated Morgan City and Houma service areas, including the areas being expropriated now and the areas for which future expropriation is planned, indicate that Cajun would experience a loss of over $39 million in nonfuel revenue, which gives a net present value loss of nearly $12.7 million.

2. *REA Analysis of Expropriation:*

REA's preliminary analysis of the financial impact of the expropriations, Attachment B, made provisions for load growth, unlike the Southern Engineering study, and further viewed the situation as Cajun's lost contribution to fixed costs. This analysis spanned the entire term of the existing wholesale power agreement which is in effect until the year 2026 and allowed for different load growth scenarios to be analyzed. REA determined that the net present value loss for Phase II, Phase III and Houma expropriations are $2.3 million, $2.3 million and $4.6 million, respectively. These losses total a net present value of $9.2 million for all expected expropriation attempts with Cajun experiencing 3 percent load growth. REA further as-

sumed that Cajun will attempt to secure off-system sales in the spot market since their generation mix does not lend itself to reduced production easily and they have been unable to secure long term firm power sales off-system. Taking into account the somewhat different methodology and assumptions used by Southern Engineering and REA, Southern Engineering's analysis of the effects of the expropriations supports REA's initial conclusion that Cajun will experience significant revenue loss as a result of these expropriations.

Morgan City made no attempt to compensate Cajun for this potential loss. As discussed below, REA will experience a direct loss on the amount of uncollected revenue because of these actions.

B. *Overall Impact on Cajun*:

The loss of consumers because of Morgan City's Phase II expropriation of SLECA's consumers will result in lost revenue to Cajun. The prospect of additional losses caused by the Morgan City Phase III and Houma expropriation greatly increases the adverse impact on Cajun.

Morgan City's proposed expropriation exacerbates the problems of low load growth and excess capacity existing in Louisiana's rural electric system. The rural cooperative system in Louisiana, through Cajun, has undertaken federally assisted debt to enable it to generate over 10,000 GWh a year. This capacity was deemed necessary to meet an annual load growth projected to be around 9 percent. As stated above, the projected load growth did not materialize and the rural cooperative system is now burdened with 5,000 (GWh) of excess capacity. Morgan City is now proposing to further damage the Louisiana rural electric

system by cream skimming SLECA's most profitable consumers. As noted throughout this analysis, this further reduction of load in a system which suffers from inadequate energy sales can only result in lost revenues.

Lost revenue to Cajun directly affects Cajun's payment obligation under "Note B." As described above "Note B" represents a contingent payment obligation until final maturity in 2036 when all amounts become due. Until maturity, payments must be made on "Note B" only if certain revenue generating events occur. Increased revenues from Member sales would obligate Cajun to make payments on "Note B." If payments are not made on "Note B," Cajun is obligated to pay all outstanding amounts at maturity. The outstanding balance of "Note B" is in excess of $1 billion. The likelihood of receiving such a lump sum payment is remote. Therefore, every effort must be made to preserve Cajun's consumer base and to encourage load growth.

In addition to the detrimental effect on the payment of federal debt, the effect of the Phase II expropriation frustrates the objectives of the REA program in Louisiana by increasing the likelihood of rate increases. As stated above, great effort has been put into lowering the rural electric rates in Louisiana so that they are supportable by the local economy and more competitive with local utilities. REA has agreed to a major reduction in Cajun's current debt service payments to effectuate a wholesale rate reduction in an attempt to improve the viability the of Louisiana rural electric cooperative system. The Morgan City Phase II expropriation at a minimum, undermines that effort. Cumulative takings represented by the Phase III and Houma expropriations, by significantly reducing Cajun's revenues, would cause Cajun to raise Member rates to compensate for such loss, in

effect negating federal efforts to lower rural electric rates in Louisiana.

V. *Summary*: Based on the foregoing analysis we have concluded as follows:

The Phase II property which is the subject of Morgan City expropriation, as well as that property which is the subject of potential Phase III and City of Houma annexation, was financed with REA loans bearing a subsidized interest rate. The customers in these areas were initially brought electric service through the REA Program and are RE Act beneficiaries. The disposition of SLECA's property and service rights in these areas requires approval of the Administrator under Section 7 of the RE Act.

The proposed expropriation must be evaluated in the light of the interests of REA and the federal taxpayer in carrying out the RE Act objecive of providing reliable electric service in rural area at rates as low as practicable, in maintaining and improving the financial stability of borrowers, in protecting the feasibility of and security for outstanding loans and in assuring that outstanding REA loans will be repaid. In evaluating these interests, we have considered the impact on the rates and financial stability of SLECA, Cajun, and Cajun's Members as well as on the repayment of REA debt and, hence, the federal taxpayer. Also, we have evaluated the impacts of the Phase II expropriation by itself and as a part of the potential Phase III and City of Houma takings. We have concluded as follows:

1. SLECA provides electric service on an area coverage basis to RE Act beneficiaries located in a relatively low income area. The electric rates which the Act beneficiaries served by SLECA must pay are significantly higher than those charged by competitors of SLECA. To carry out the Act objective of providing reasonably priced power to persons served by SLECA,

REA should take all reasonable actions to avoid rate increases.

2. SLECA's financial profile is not strong. While it has met required financial tests established by REA and CFC, it has barely exceeded the minimal levels and is significantly below national averages. Overall Cajun and the 13 distribution members comprising Cajun, are not financially healthy. Cajun has significant surplus power and, even after debt restructuring, Cajun's rates are significantly higher than its competitors. Any further deterioration in the financial condition of SLECA, Cajun and the other distribution members will frustrate the RE Act objective of developing and maintaining the financial strength of the REA borrowers.

3. Any loss of high density/high growth or high margin producing service territory will have a long term adverse impact on SLECA. SLECA may not be able to meet minimum TIER levels without increasing its rates. While qualification is difficult, it is clear that loss of high density/high growth and high margin producing areas will adversely effect SLECA's rates and financial health.

4. Any loss of load by SLECA or other Cajun members will adversely effect Cajun and all of its members since the integrated power supply system must carry the same fixed costs with smaller KWh sales. Further, any load loss will, in all likelihood, reduce the amount of REA loans which will be repaid pursuant to the terms of the Debt Restructure Agreement. While the amount of the direct loss that REA will suffer is difficult to project, it is clear that there will be a reduction in the amount of payment received by REA on the B Note as a result of load loss

by Cajun and that the interests of REA and the federal taxpayer in maximizing recovery on outstanding loans will be frustrated.

5. For REA's purposes, the Morgan City expropriation action should not be considered an isolated taking. Rather, if successful, it could mark the beginning of several actions by Morgan City and other municipalities to acquire property and territorial service right of SLECA and other REA borrowers in Louisiana. The property and territorial service rights sought by Morgan City in Phase II and, potentially, Phase III and by the City of Houma are high density/high growth and high margin areas. The property and territorial service rights were acquired by SLECA with REA approval and financial assistance under the RE Act and represent the more lucrative portions of the SLECA system. Loss of such property and service rights would adversely affect remaining RE Act beneficiaries served by the system. The loss of any of this property and service rights would frustrate the objectives of the Act to provide electric service at reasonable rates, to develop the financial strength of REA borrowers, to maintain the feasibility of and security for outstanding loans and to ensure that REA loans are repaid.

VI. *Conclusion*:

For the reasons summarized above, we believe that the disposition of the SLECA property including territorial service rights which is the subject of the Phase II and Phase III proposal of Morgan City and the proposal of the City of Houma is contrary to the interests of REA and would frustrate the objectives of the RE Act. Therefore, we recommend that, under section 7 of the RE Act, you withhold approval of the disposition pursuant to expropriation action.

RECOMMENDED:

/s/ [Illegible]
Director, Southern Regional Division — 6/12/92 Date

/s/ John H. Arnesen
Assistant Administrator—Electric — 6/12/92 Date

CONCURRED:

/s/ Thomas L. Eddy
Acting Assistant to the Administrator, Financial Services Staff — 6/12/92 Date

/s/ Michael W. Kelly
The Office of the General Counsel — 6/12/92 Date

APPROVED:

/s/ [Illegible]
Acting Administrator — 6/16/92 Date

Attachments

APPENDIX E

§ 901. Short title

This chapter may be cited as the "Rural Electrification Act of 1936".

§ 902. Loans by Secretary; investigations and reports

(a) The Secretary of Agriculture is authorized and empowered to make loans in the several States and Territories of the United States for rural electrification and the furnishing of electric energy to persons in rural areas who are not receiving central station service and for the purpose of furnishing and improving electric and telephone service in rural areas, as provided in this chapter, and for the purpose of assisting electric borrowers to implement demand side management, energy conservation programs, and on-grid and off-grid renewable energy systems; to make, or cause to be made, studies, investigations, and reports concerning the condition and progress of the electrification of and the furnishing of adequate telephone service in rural areas in the several States and Territories; and to publish and disseminate information with respect thereto.

* * * *

§ 907. Acquisition of property pledged for loans; disposition; sale of pledged property by borrower

The Secretary is authorized and empowered to bid for and purchase at any foreclosure or other sale, or otherwise to acquire, property pledged or mortgaged to secure any loan made pursuant to this chapter; to pay the purchase price and any costs and expenses incurred in connection therewith from the sums authorized in section 903 of this title; to accept title to any property so purchased or acquired in the name of the United States of America; to operate or lease such property for such period as may be deemed necessary or advisable to pro-

tect the investment therein, but not to exceed five years after the acquisition thereof; and to sell such property so purchased or acquired, upon such terms and for such consideration as the Secretary shall determine to be reasonable.

No borrower of funds under sections 904 or 922 of this title shall, without the approval of the Secretary, sell or dispose of its property, rights, or franchises, acquired under the provisions of this chapter, until any loan obtained from the Rural Electrification Administration, including all interest and charges, shall have been repaid.

§ 908. Transfer of functions of Administration created by Executive Order

The administration of loans and contracts entered into by the Rural Electrification Administration established by Executive Order Numbered 7037, dated May 11, 1935, may be vested by the President in the Secretary; and in such event the provisions of this chapter shall apply to said loans and contracts to the extent that said provisions are not inconsistent therewith. The President may transfer to the Secretary the jurisdiction and control of the records, property (including office equipment), and personnel used or employed in the exercise and performance of the functions of the Rural Electrification Administration established by such Executive order.

§ 912. Extension of time for repayment of loans

(a) The Secretary is authorized and empowered to extend the time of payment of interest or principal of any loans made by the Secretary pursuant to this chapter: *Provided, however,* That with respect to any loan made under section 904 or 922 of this title, the payment of interest or principal shall not be extended more than five years after such payment shall have become due, and with respect to any loan made under section 905 of this title, the payment of principal or interest shall not be extended

more than two years after such payment shall have become due: *And provided further,* That the provisions of this section shall not apply to any obligations or the security therefor which may be held by Reconstruction Finance Corporation under the provisions of section 903 of this title.

(b)(1) Subject to limitations established in appropriations Acts, the Secretary shall permit any borrower to defer the payment of principal and interest on any insured or direct loan made under this Act under circumstances described in this subsection, notwithstanding any limitation contained in subsection (a), except that such deferment shall not be permitted based on the determination of the Secretary of the financial hardship of the borrower.

(2)(A) In the case of deferments made to enable the borrower to provide financing to local businesses, the deferment shall be repaid in equal installments, without the accrual of interest, over the 60-month period beginning on the date of the deferment, and the total amount of such payments shall be equal to the amount of the payment deferred.

(B) In the case of deferments made to enable the borrower to provide community development assistance, technical assistance to businesses, and for other community, business, or economic development projects not included under subparagraph (A), the deferment shall be repaid in equal installments, without the accrual of interest, over the 120-month period beginning on the date of the deferment, and the total amount of such payments shall be equal to the amount of the payment deferred.

(3)(A) A borrower may defer its debt service payments only in an amount equal to an investment made by such borrower as described in paragraph (2).

(B) The amount of the deferment shall not exceed 50 percent of the total cost of a community or economic de-

velopment project for which a deferment is provided under this subsection.

(C) The total amount of deferments under this subsection during each of the fiscal years 1990 through 1993 shall not exceed 3 percent of the total payments due during such fiscal year from all borrowers on direct and insured loans made under this Act and shall not exceed 5 percent of such total payments due in each subsequent fiscal year.

(D) At the time of a deferment, the borrower shall make a payment to a cushion of credit account established and maintained pursuant to section 940c of this title in an amount equal to the amount of the payment deferred. The balance of such account shall not be reduced by the borrower below the level of the unpaid balance of the payment deferred. Subject to limitations established in annual appropriations Acts, such cushion of credit amounts and any other cushion of credit and advance payments of any borrower shall be included in the interest differential calculation under section 940c(b)(2)(A) of this title.

(4) The Secretary shall undertake all reasonable efforts to permit the full amount of deferments authorized by this subsection during each fiscal year.

§ 912a. Rescheduling and refinancing of loans

In addition to the loan extension authority provided in section 12 of the Rural Electrification Act [7 U.S.C.A. § 912], the Secretary of Agriculture is authorized to adjust and readjust the schedules for payment of principal and interest on loans to borrowers under programs administered by the Secretary under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.), and to extend the maturity date of any such loan to a date not beyond forty years from the date of such loan where he determines such action is necessary because of the impairment of the economic feasibility of the system, or the loss, destruction,

or damage of the property of such borrowers as a result of a major disaster.

§ 913. Definitions

As used in this chapter the term "rural area", except as provided in section 924(b) of this title, shall be deemed to mean any area of the United States not included within the boundaries of any urban area, as defined by the Bureau of the Census, and such term shall be deemed to include both the farm and nonfarm population thereof; the term "farm" shall be deemed to mean a farm as defined in the publications of the Bureau of the Census; the term "person" shall be deemed to mean any natural person, firm, corporation, or association; the term "Territory" shall be deemed to include any insular possession of the United States; and the term "Secretary" shall be deemed to mean the Secretary of Agriculture.

§ 915. Purchase of financial and credit reports

The Secretary of Agriculture is authorized to purchase such financial and credit reports as may be necessary to carry out the Secretary's authorized work; *Provided,* That purchases under this authority shall not be made unless provision is made therefor in the applicable appropriation and the cost thereof is not in excess of limitations prescribed therein.

§ 916. Criteria for loans

In order to insure coordination of electric generation and transmission financing under this chapter with the national energy policy, the Secretary in making or guaranteeing loans for the construction, operation, or enlargement of generating plants or electric transmission lines or systems, shall consider such general criteria consistent with the provisions of this chapter as may be published by the Secretary of Energy.

§ 930. Congressional declaration of policy

It is hereby declared to be the policy of the Congress that adequate funds should be made available to rural electric and telephone systems through direct, insured and guaranteed loans at interest rates which will allow them to achieve the objectives of this chapter, and that such rural electric and telephone systems should be encouraged and assisted to develop their resources and ability to achieve the financial strength needed to enable them to satisfy their credit needs from their own financial organizations and other sources at reasonable rates and terms consistent with the loan applicant's ability to pay and achievement of this chapter's objectives.

APPENDIX F

United States Constitution, Article VI, Clause 2 ("Supremacy Clause")

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

(2)

Supreme Court, U.S.
FILED
JUL 25 1995
CLERK

No. 94-2135

In The

Supreme Court of the United States

October Term, 1995

CITY OF MORGAN CITY,

Petitioner,

v.

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, CAJUN ELECTRIC POWER COOPERATIVE, INC., AND THE UNITED STATES OF AMERICA, through the RURAL UTILITIES SERVICE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

James M. Funderburk
Bar Roll No. 5785
Duval, Funderburk, Sundbery & Lovell, L.L.P.
101 Wilson Avenue
Post Office Box 3017
Houma, Louisiana 70361
Telephone: (504) 876-6410
Attorney for Respondent, South Louisiana Electric Cooperative Association

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

Does 7 U.S.C. § 907 preempt, by conflict and pursuant to the Supremacy Clause, the state expropriation power granted by the State of Louisiana to the City of Morgan City if the unilateral taking of the utility customers in question would frustrate a federal purpose?

PARTIES TO THE PROCEEDING BELOW

All parties to the proceeding below are named in the caption. The United States appeared below through the Rural Electrification Administration, an agency within the United States Department of Agriculture charged through its Administrator with responsibility for the Rural Electrification Act. As part of its reorganization of the Department of Agriculture, Congress has created a new federal agency within the Department, the Rural Utilities Service, and assigned to its Administrator the administration of the Rural Electrification Act. The caption of this Petition reflects that change.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE OPINIONS BELOW 2

HISTORICAL OVERVIEW 4

REASONS FOR NOT ISSUING THE WRIT 7

1. THE DECISION OF THE COURT BELOW IS CORRECT AND IS IN HARMONY WITH OTHER DECISIONS ADDRESSING THE SAME ISSUE 7

2. THE CITIZENS OF THE NEWLY ANNEXED AREA DO NOT WANT POWER FROM MORGAN CITY EITHER 8

3. THE DECISION OF THE COURT OF APPEALS AND THE DISTRICT COURT IS CONSISTENT WITH THE DECISIONS OF SIMILAR COURTS AND THIS COURT'S PREEMPTION DECISIONS 9

4. IN ADDITION TO THE STATUTORY BASIS FOR DENYING THE EXPROPRIATION, THERE IS ALSO A FRUSTRATION OF FEDERAL PURPOSE UNDER THE PREEMPTION DOCTRINE 15

TABLE OF CONTENTS – Continued

Page

5. THERE IS NO GENUINE ISSUE OF MATERIAL FACT IN THIS CASE AND THE MOTION FOR SUMMARY JUDGMENT GRANTED BY THE COURTS BELOW MUST STAND..... 22

6. EVEN STATE COURTS HAVE NOT UNIFORMLY REJECTED THE REA'S FRUSTRATION THEORY 25

7. THE DECISION OF THE COURT OF APPEALS IS NOT INCONSISTENT WITH THIS COURT'S PREEMPTION DECISIONS..... 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES:

Alabama Power Company v. Alabama Electric Cooperative, Inc., et al, 394 F.2d 672 (5th Cir. 1968), *rehearing denied*, 397 F.2d 809 (5th Cir. 1968), *cert. denied*, 393 U.S. 1000, 89 S.Ct. 488, 21 L.Ed.2d 465 (1968) 11

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) 23

Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375, 103 S.Ct. 1905 (1983) 16, 26, 27

California v. FERC, 495 U.S. 490, 506, 1105 S.Ct. 2024 (1990), *rehearing denied*, 497 U.S. 1040 (1990) 16

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), *on remand*, 826 F.2d 33 (1987), cert. denied, 484 U.S. 1066, 108 S.Ct. 1028 (1988), see also, 484 U.S. 1066, 108 S.Ct. 1028, 98 L.Ed.2d 992 (1988) 22, 23

City of Fairbanks v. Electric Distribution System, 413 P.2d 165 (1966) 11, 25

City of Madison, Mississippi v. Bear Creek Water Association, Inc., 816 F.2d 1057 (5th Cir. 1987) ..... *passim*

City of Morgan City v. South Louisiana Electric Cooperative Association, 31 F.3d 319, 49 F.3d 1074 (5th Cir. 1995), 49 F.3d 1076 3

City of Rochester v. People's Co-op Power Association, Inc., 505 N.W.2d 621 (Minn. App. 1993), see also, 483 N.W.2d 477, No. C090281, Minn. 3d JDC, Homestead County 25

TABLE OF AUTHORITIES – Continued

Page

City of Thibodaux v. Hillman, 464 So.2d 370 (La. App. 1 Cir. 1985) 5

Dairyland Power Cooperative, 37 F.P.C. 12, 67 P.U.R. 340 11

Fidelity Federal Savings & Loan Association v. Delacuesta, 458 U.S. 141, 102 S.Ct. 3014 (1982) 16

Hines v. Davidowitz, 312 U.S. 52, 61 S.Ct. 399 (1941).. 16, 27

International Paper Co. v. Ouellette, 479 U.S. 481 (1987), 107 S.Ct. 805, *on remand*, 823 F.2d 545 (1987), *on remand*, 666 F.Supp. 58 (1987)..... 9

Jones v. Rath Packing Co., 430 U.S. 519 (1977), *rehearing denied*, 431 U.S. 925, 97 S.Ct. 2201 (1977), 97 S.Ct. 1305..... 17

Louisiana Public Service Commission v. F.C.C., 476 U.S. 355, 106 S.Ct. 1890 (1986)..... 15

Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)..... 23

Michigan Canners and Freezers Association v. Agricultural Marketing and Bargaining Board, 467 U.S. 461, 104 S.Ct. 2518 (1984) 15, 17

Mieri v. Dacon, 759 F.2d 989 (2nd Cir. 1985), *cert. denied*, 474 U.S. 829, 106 S.Ct. 91, 88 L.Ed.2d 74 (1985)..... 23

TABLE OF AUTHORITIES – Continued

Page

National Broadcasting Co. v. Federal Communications Commission, 516 F.2d 1101 (D.C. Cir. 1974), 170 U.S. App. D.C. 173, *cert. denied*, 96 S.Ct. 1105, 424 U.S. 910, 47 L.Ed.2d 313 (U.S. Dist. Col. 1976) 14

Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190, 103 S.Ct. 1713 (1983) 15, 16, 26, 27

Public Utility District No. 1 of Franklin County v. Big Bend Electric Cooperative, Inc., 618 F.2d 601 (9th Cir. 1980) ..... *passim*

Public Utility District No. 1 v. Inland Power & Light Company, 64 Wash. 2d 122, 320 P.2d 690 (1964) 10, 25

Public Utility District No. 1 of Pend Oreille County v. United States, 417 F.2d 200 (9th Cir. 1969) 2, 9, 10, 17, 29

Rivers v. Schweiker, 684 F.2d 1144 (5th Cir. 1982) 7

Simmons v. McGuffey Nursing Home, Inc., 619 F.2d 369 (C.A. 5th 1980), quoting *Wright & Miller*) 22

Slaughter v. Allstate Insurance Company, et al., 803 F.2d 857 (5th Cir. 1986) 22

United States v. 101.88 Acres of Land, 616 F.2d 762 (5th Cir. 1980) 7

United States v. Kimbell Foods, Inc., 440 U.S. 715, 99 S.Ct. 1448 (1979), *on remand*, 600 F.2d 478 (1979) .. 26, 28

TABLE OF AUTHORITIES – Continued

Page

Wabash Valley Power Association, Inc. v. Rural Electrification Administration, 903 F.2d 445 (7th Cir. 1990) 26, 28

Washington v. Armstrong World Industries, Inc., 839 F.2d 1121 (5th Cir. 1988) 22

STATUTES:

Fed. R. Civ. P. 1 23

5 U.S.C. § 706 ..... 14, 18

7 U.S.C. § 901 ..... 2, 10, 13

7 U.S.C. § 903 10

7 U.S.C. § 904 ..... 6, 9

7 U.S.C. § 907 ..... *passim*

7 U.S.C. § 922 9

7 U.S.C. § 1926(b) 14, 15

28 U.S.C. § 1254(1) 1

Louisiana Revised Statutes 19:101, et seq. 5

CONSTITUTIONAL PROVISION:

U. S. Const. art. VI, cl. 2 (Supremacy Clause) ... 2, 11, 29

REGULATION:

7 C.F.R. 1710.103 6

OTHER AUTHORITY:

Wright & Miller, Vol. 10, p. 564, 1983 22

Respondent, South Louisiana Electric Cooperative Association, hereinafter sometimes referred to as SLECA, a Louisiana electric cooperative domiciled in Houma, Terrebonne Parish, Louisiana, respectfully suggests that a writ of certiorari need not issue because the judgment and opinion of the courts below are correct.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit dated September 12, 1994, is reported at 31 F.3d 319, and is set forth in the Appendix[1] of petitioner at 1a. There is a per curiam opinion of April 3, 1995, reported at 49 F.3d 1074 but there was no rehearing as stated by petitioner. There was a dissent written by Judge Jones on behalf of the three judges who dissented from the denial of rehearing en banc and which is reported at 49 F.3d 1076, both of which opinions are set forth appropriately in the petitioner's Appendix. The opinions of the majority of the Fifth Circuit affirmed the opinion of the United States District Court for the Western District of Louisiana, Honorable Rebecca F. Doherty, which is reported at 837 F.Supp. 194 and is set forth at App. 12a. One additional relevant decision is that of the Rural Electrification Administration (now known as the Rural Utilities Service and which may sometimes hereinafter be referred to as REA) which is set forth at petitioner's App. 35a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on September 12, 1994. The petition for rehearing was denied on April 3, 1994, as was the denial of rehearing en banc. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

---

[1] For the sake of brevity, respondent will refer to the Appendix of petitioner throughout this brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Rural Electrification Act, 7 U.S.C. § 901, et seq., are applicable and are set forth at petitioner's App. 76a. The Supremacy Clause, United States Constitution, art. VI, cl. 2, is also applicable and is set forth at petitioner's App. 82a.

STATEMENT OF THE OPINIONS BELOW

The trial court determined that 7 U.S.C. § 907 preempts, by conflict and pursuant to the Supremacy Clause, the state expropriation power granted by the State of Louisiana to the City of Morgan City because it would frustrate a federal purpose, that of providing electricity to rural America at a reasonable cost. In reaching this decision, the trial court followed well-reasoned and longstanding federal decisions in the Ninth and Fifth Circuits. There are no other federal decisions in any circuit or in this Honorable Court to the contrary. *Public Utility District No. 1 of Pend Oreille County v. United States*, 417 F.2d 200 (9th Cir. 1969); *Public Utility District No. 1 of Franklin County v. Big Bend Electric Cooperative, Inc.*, 618 F.2d 601 (9th Cir. 1980); and *City of Madison, Mississippi v. Bear Creek Water Association, Inc.*, 816 F.2d 1057 (5th Cir. 1987).

The trial court reasoned as did both the *Pend Oreille* and *Big Bend* courts that 7 U.S.C. § 907 covered both voluntary and involuntary dispositions of property. The involuntary dispositions being caused by the unilateral actions of municipalities exercising their rights of eminent domain/expropriation.

The Fifth Circuit affirmed the district court on the broader constitutional issue that the state law expropriation is preempted because it would frustrate a federal purpose although in its per curiam opinion denying Morgan City's Petition for Rehearing, the court noted that even a narrow

interpretation of § 907 supports the original preemption analysis and thus Morgan City's attempt to expropriate the subject property was precluded.[2]

Petitioner now tries to convince this court that the Decision of the Fifth Circuit Court of Appeal somehow "curtails the natural expansion of many cities that provide public power to their citizens and nullifies state laws and policies that afford municipalities the exclusive right to provide electric service to their citizens", p. 2 of petitioner's brief. Petitioner also reaches deep into its bag of tricks and cites the dissent in the denial of the rehearing en banc as a breathtaking federal power grab. It is nothing of the sort. First and foremost, the expansion of the City of Morgan City occurred long ago and had nothing whatsoever to do with the expropriation which followed many years later. Specifically, the annexation is a three-phase one. *Phase I* occurred in the early 1980's and did not involve any potential utility customers and so was never an issue. *Phase II* occurred in 1986, whereas the Petition for Expropriation was not filed until August 3, 1990, following off and on again negotiations between SLECA and the City of Morgan City. It does involve the utility customers which are the subject of this case. *Phase III* annexation has not yet occurred but will occur according to the sworn testimony of the Honorable Cedric S. LaFleur, mayor of the City of Morgan City, and its consulting engineer, Harold J. Beard, App. 14a. This court should not be misguided then by the false issue which petitioner attempts to create, that somehow the natural annexation process which occurs throughout this country will be affected or that the state laws which allow for the annexation will somehow be weakened or that the state's constitutional rights to annex new territory is abridged. The annexation of the areas in question has occurred and is not at all affected by the separate issue of under what circumstances a municipality may expropriate utility customers within an

---

[2] *City of Morgan City v. South Louisiana Electric Cooperative Association*, 49 F.3d 1074 (5th Cir. 1995).

area that has been annexed. The two issues are totally separate and distinct and the municipalities have lost nothing because their rights of annexation remain intact. Stated slightly differently, the right of annexation has nothing to do with the power of eminent domain (expropriation).

HISTORICAL OVERVIEW

SLECA is a distribution cooperative headquartered in Houma, Terrebonne Parish, Louisiana, and provides service in the southeastern portion of the state to approximately 15,000 members in a five parish area. Since February 3, 1937, SLECA has received 25 REA federally subsidized loans totaling over $38 Million and supplemental financing from other lenders exceeding $12 Million. As of December 31, 1991, SLECA owed REA in excess of $25 Million and its counterpart, National Rural Utilities Cooperative Finance Corporation (CFC) in excess of $9 Million. SLECA serves a relatively low income area and purchases all of its power requirements from Cajun Electric Power Cooperative, Inc. (CAJUN), a generation and transmitting utility company to which it is bound through a wholesale power contract that extends through December 31, 2026. SLECA's key financial ratios and other statistics are below the median values of other cooperatives located in Louisiana and in the United States. There are no certified electric service territories in Louisiana and thus, the relative competitiveness of SLECA's retail rates is important to SLECA's financial health. As of January 1, 1992, CAJUN's total debt obligations to the United States was in excess of $3.5 Billion and it has encountered severe financial difficulties and thus, REA has restructured CAJUN's debt. App. 38a-46a. Since the decision of the courts below, CAJUN has sought protection from its creditors in a Chapter 11 bankruptcy proceeding, "In Re: Cajun Electric Power Cooperative, Inc., Debtor", Case No. 94-11474, USDC No. 94-CV-2763.

The compensation which petitioner, Morgan City, offered to respondent, SLECA, is so inadequate that it does not even

meet the meager requirements of Louisiana law.[3] Furthermore, the compensation, because it occurs over an eight year period, *without interest*, does not allow for the repayment of the federal loans in question as is required by 7 U.S.C. § 907.

In round numbers, the City of Morgan City offered SLECA $896,000 payable over an eight year period at approximately $112,000 per year. App. 48a, see also App. 14a. Simple mathematics will reflect that, in essence, Morgan City is demanding an interest free loan from both SLECA and the U.S.A. Morgan City, being a municipality, is not entitled to receive federally subsidized loans, much less interest free loans. Even though the payment for the taking of SLECA's best customers occurs on an interest-free basis over a period of eight years, SLECA loses all of its customers immediately and, thus, the revenue from all of those customers immediately, yet must continue to pay its loans to REA. It is obvious that there is no provision contained within Morgan City's offer to repay the federal loans because the funds are simply not sufficient to do so. Obviously, the REA Administrator was not happy with this arrangement and, for this reason and many others set forth in the detailed administrative review and opinion, declined to permit the transfer.

Petitioner offered CAJUN nothing for its interest.

Following the simple mathematics involved, therefore, Morgan City was to pay SLECA approximately $112,000 per year and yet was going to take from SLECA in the *Phase II* expropriation alone, gross revenues of $653,605 in the first year. App. 60a. These losses increase dramatically over time and, for example, by 1997 would be $1,020,684 which is far more than the amount offered by Morgan City. Furthermore, when the *Phase III* annexation and expropriation is considered, and based on the testimony of the mayor of the City of Morgan City, Honorable Cedric S. LaFleur, and its consulting

---

[3] It did not go unnoticed by the trial court or the Fifth Circuit that the offer of Morgan City did not even meet the minimum requirements of Louisiana's expropriation law found in L.R.S. 19:101, et seq. The payment required by the state statute has been construed to mean cash payment. *City of Thibodaux v. Hillman*, 464 So.2d 370 (La. App. 1 Cir. 1985).

engineer, Harold Beard, this event would occur, then the losses to SLECA are substantially more. App. 62a and 63a.

A similar analysis regarding the impact to CAJUN was prepared and its losses are fairly significant as well. App. 67a-69a.

Thus, this expropriation case must be evaluated from the perspective of the impact of the unilateral taking of SLECA's customers on the objectives of the REA program, the structure adopted by REA to carry out the program, and the feasibility of and security for REA loans and/or loan guarantees made to SLECA and CAJUN. It is no secret that Congress established the REA and authorized the Administrator to provide long-term, low interest rate loans, subsidized by the federal taxpayer, to accomplish the objectives of providing reliable electric service at affordable cost in rural areas at a time when existing utilities refused to provide service in those rural areas.

Central to the goal of the REA program are the principles that electric service will be provided to the widest number of consumers possible, and that the cost and benefits of service will, to the extent practical, be shared by all members on the same basis. The organizational structure of the cooperatives and the financial policies of the REA are designed to further those principles. Hence, REA approves loans to serve new customers based on the economies of the borrowers' entire service area, including yet undeveloped areas, not just the economies of the new consumers. REA requires, as a term of the loan, that each borrower practice area coverage. Area coverage is the concept whereby a borrower extends electric service to *all* persons within its service area who meet all reasonable requirements, and that, to the maximum extent practical, such service be provided to all consumers at the same rates at minimum charges. See 7 C.F.R. 1710.103.

Hence, the RE Act imposes on the Administrator the duty to determine that each loan is feasible and that loan security is reasonably adequate. 7 U.S.C. § 904. As part of determining whether the loan security is adequate, the Administrator must obviously determine whether to permit transfers as that proposed by Morgan City including transfers which result in the

distribution cooperative and the federal government in essence making interest-free loans to a municipality. There is no basis whatsoever in the RE Act or in any jurisprudence which suggests that Congress even remotely intended for petitioner, Morgan City, to be the beneficiary of such an interest-free loan. Therefore, the entire basis of Morgan City's argument and its expropriation case is groundless.

REASONS FOR NOT ISSUING THE WRIT

1. THE DECISION OF THE COURT BELOW IS CORRECT AND IS IN HARMONY WITH OTHER DECISIONS ADDRESSING THE SAME ISSUE

Municipalities have no constitutional right to covet the property of another and since federal courts have clearly held that eminent domain is a governmental power, not a property right, there is no constitutional protection which includes the desired rights in the property of another. *Rivers v. Schweiker*, 684 F.2d 1144, 1158 (5th Cir. 1982); *United States v. 101.88 Acres of Land*, 616 F.2d 762, 767 (5th Cir. 1980).

Nevertheless, petitioner continues to pretend that its annexation program will be adversely affected and that somehow Morgan City will be denied due process. This argument is clearly backward. The annexation of the present area occurred in 1986. There is nothing in the record whatsoever to show that Morgan City has in any way been damaged by the actions of the courts below and, in fact, the contrary is true. Morgan City has not invested one dime in the additional generation and transmission facilities which would require service to the customers in the newly annexed area nor has it built any lines, transformers, substations or other facilities to those customers. Morgan City has, therefore, lost nothing. On the other hand, SLECA and CAJUN have both invested enormous sums of money in their utility programs and have borrowed enormous sums of money from the REA to finance these programs.

Morgan City now even pretends that other municipalities within the Fifth Circuit and the Ninth Circuit will somehow

be denied the right to annex new territories. This is a disingenuous argument to the extreme and there is absolutely nothing in the record to suggest that there has been any slowing of annexation or, for that matter, expropriation under the right circumstances.

2. THE CITIZENS OF THE NEWLY ANNEXED AREA DO NOT WANT POWER FROM MORGAN CITY EITHER

Morgan City attempts to sell the Court on the theory that its citizens will somehow be deprived of the right to buy electricity from it. Morgan City fails to tell the Court though that those same citizens voted nearly unanimously to continue accepting power from SLECA rather than Morgan City and so neither the Administrator of the REA, the officials at SLECA or the citizens involved desire to see Morgan City sell electricity in this area.

The citizens of the newly annexed area will not be deprived of electric service and, as was seen in the Affidavit of Calvin Savoy, the manager of SLECA's Amelia, Louisiana, office, signed by him October 13, 1992, and made part of SLECA's reply brief in opposition to Morgan City's motion for summary judgment before the District Court, an overwhelming majority of the SLECA utility customers which Morgan City seeks to condemn, desire to continue receiving electricity from SLECA rather than Morgan City. Specifically, 195 meters out of 250 meters were represented by the data supplied by Mr. Savoy. Eighteen members refused to sign the petition in question, 16 could not be contacted and 3 had moved before they were able to be contacted. Nevertheless, the subject petition contained 230 signatures, all of whom indicated a wish to continue receiving electricity from SLECA rather than changing to Morgan City. The questionnaire submitted to the approximately 252 customers directly affected by Morgan City's expropriation attempt read as follows:

> "I am presently receiving electric service from SLECA. I would like to continue receiving service from SLECA, and I am against the expropriation

suit filed by the City of Morgan. I do not wish to receive electricity from the City of Morgan City."

3. THE DECISION OF THE COURT OF APPEALS AND THE DISTRICT COURT IS CONSISTENT WITH THE DECISIONS OF SIMILAR COURTS AND THIS COURT'S PREEMPTION DECISIONS

The issue in this case is not new and has been presented before with the same results. The Administrator of the Rural Electrification Administration, pursuant to 7 U.S.C. § 907, may withhold approval of the expropriation and transfer of federally financed and mortgaged property since that statute does preempt, by conflict and pursuant to the Supremacy Clause of the United States Constitution, the state expropriation power granted by the State of Louisiana to the City of Morgan City. 7 U.S.C. § 907 provides in pertinent part:

> "No borrower of funds under Section 4 of Section 201 (7 U.S.C. § 904 or § 922) shall, without the approval of the Administrator, sell or dispose of its property, rights, or franchises, acquired under the provisions of this Act, until any loan obtained from the Rural Electrification Administration, including all interest and charges, shall have been repaid."

The Act does not require that the disposition be "voluntary" or "involuntary." It does not mention the terms "expropriation" or "eminent domain." Nevertheless, petitioner has argued and continues to argue that § 907 does not apply and, therefore, cannot preempt its actions because the statute does not specifically address expropriation law, but refers only to transactions that "sell or dispose" of property. This argument has been consistently rejected by the federal courts and case law has firmly held that prohibitive dispositions of property under § 907 include condemnations. *Big Bend*, 618 F.2d at 602 and *Pend Oreille*, 417 F.2d at 200-202. This result must follow from the express terms of § 907 because an expropriation or condemnation is nothing more than a forced sale and clearly disposes of a cooperative's property. Morgan City's argument, therefore, is anomalous. To interpret § 907 to allow the REA to bar a consensual sale of cooperative property to a

municipality based upon an express finding that the federal interest would be ill-served by that transfer, but then to allow the municipality to turn around and use state law in an expropriation suit over the REA's same objection would severely cripple the Supremacy Clause and render its meaning useless. The Supreme Court has always held that states may not accomplish indirectly what the Supremacy Clause forbids them from doing directly. *International Paper Co. v. Ouellette*, 479 U.S. 481, 495-496 (1987), 107 S.Ct. 805, *on remand*, 823 F.2d 545 (1987), *on remand*, 666 F.Supp. 58 (1987); *Bear Creek*, 816 F.2d at 1059.

The issue of the REA authority to approve or disapprove of expropriation proceedings pursuant to § 907 and to find same preempted pursuant to the Supremacy Clause has been addressed in both the Ninth and Fifth Circuits. These decisions were followed by the courts below. The issue of administrator approval of the condemnation of federally financed utility property was first presented in the case of *Public Utility District No. 1 of Pend Oreille County v. United States of America*, 417 F. 2d 200 (9th Cir. 1969). The Ninth Circuit, in an exhaustive opinion, reviewed the history of the REA Act, 7 U.S.C. § 901, et seq., and noted that in 1936, Congress was concerned with the fact that those then engaged in the business of generating electric energy had failed to extend electric service to the farms and rural areas of America and thus created the Rural Electrification Administration (REA). The Administrator was authorized to make low interest loans for rural electrification and to study the condition and program of electrification in rural areas pursuant to 7 U.S.C. § 903. The Court also observed that Congress determined that the national interest would be served by subsidizing the rural user of electricity and noted that Congress deliberately retained, in 1955, the requirement that the Administrator make a yearly, unelectrified farm survey, pursuant to 7 U.S.C. § 903(c).

At the time of its decision in *Pend Oreille*, the Ninth Circuit noted that it was apparently a case of first impression, although it did review other cases which touched the subject matter.

In *Public Utility District No. 1 v. Inland Power & Light Company*, 64 Wash. 2d 122, 320 P. 2d 690 (1964), the Ninth

Circuit noted that the Supreme Court of Washington, in holding that the United States was an indispensable party to this kind of condemnation suit, found that the United States had a substantial interest in the Inland properties. The Ninth Circuit also cited, in its historical review of the issue of administrator approval, *City of Fairbanks v. Electric Distribution System*, 413 P. 2d 165 (1966), where the Supreme Court of Alaska, in considering the indispensability of the United States as a party, noted the interest of the United States in the continued functioning of an REA subsidized distributor and the possibility that a condemnation of a part of the system might damage the capacity of the remaining system and, therefore, of the condemnee to continue in business.

Next, the Ninth Circuit cited *Alabama Power Company v. Alabama Electric Cooperative, Inc., et al*, 394 F.2d 672 (5th Cir. 1968), *rehearing denied*, 397 F.2d 809 (5th Cir. 1968), *cert. denied*, 393 U.S. 1000, 89 S.Ct. 488, 21 L.Ed 2d 465 (1968), wherein the Fifth Circuit, in holding the REA cooperative exempt from anti-trust laws, said this:

> "The power company would treat REA simply as a rival public utility. We agree with the recent decision of the Federal Power Commission in *Dairyland Power Cooperative*, 37 F.P.C. 12, 67 P.U.R. 340, that rural electric cooperatives are something more than public utilities; *they are instrumentalities of the United States*. (Emphasis added). They were chosen by Congress for the purpose of bringing abundant, low-cost electric energy to rural America. *Alabama Power, supra*, at p. 677."

The Ninth Circuit analyzed the Supremacy Clause of the Constitution of the United States, Art. VI, Clause 2[4], and at p. 202 of its decision, the Court stated:

---

[4] The Supremacy Clause provides in relevant part: This Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby anything in the Constitution or laws of any state to the contrary notwithstanding.

> "Congress has declared the federal purpose to electrify the American farm. No matter how we characterize the vehicle which gets the electricity there, a state law so written that a state-favored utility can, by its unilateral action, interfere with the federal purpose, cannot stand under the Supremacy Clause of the Constitution of the United States."

Hence, the Court concluded at p. 903 of its decision that it would not permit a state law to frustrate an overriding federal purpose. The Court was careful to add that not all state condemnation actions would be affected, but rather only those where the taking for state purposes would interfere with the federal purpose.

Thus, at p. 201, in giving its reasons for reversing the trial court, the Ninth Circuit stated:

> "In an ordinary condemnation case, the condemnee loses something of value, but is paid for it. This is not an ordinary case, because what is sought to be taken here is part of a system, and even if the part taken is paid for, and if an award is made for the damage to the remaining portion, a question remains as to the capacity of the remaining portions of the system to function. As we understand the law of Washington, the capacity of a condemnee to continue to function as a healthy economic unit is not relevant to the issue of the taking. In this case, if, as a result of the condemnation, the loans to Inland were paid in full, but the remaining portions of the system could not continue to operate with decent service and at decent rates, the government would have been paid, but the purposes of the Rural Electrification Act would have been frustrated.
>
> The problem then comes down to this: May part of the distribution system of a federally subsidized distributor of electricity be taken under a law which looks only to the necessity of the taker, which vests in the taker the right to determine the necessity, and which makes no requirement that an underlying federal purpose be considered? We think not."

In *Public Utility District No. 1 of Franklin County v. Big Bend Electric Cooperative, Inc.*, 618 F.2d 601 (9th Cir., 1980), the issue was revisited by the Ninth Circuit. In *Big Bend*, plaintiff attempted, under a state condemnation statute, to acquire property from Big Bend Electric Cooperative, Inc. Big Bend was financed by the Rural Electrification Administration pursuant to the Rural Electrification Act, 7 U.S.C. § 901, and had mortgaged all of its assets to REA in exchange for loans with the debt being in excess of $10 Million. The Court of Appeal affirmed the trial court's granting of a summary judgment in favor of Big Bend. The plaintiff, P.U.D., made essentially the same arguments which Morgan City now presents to this Court. In rejecting those arguments, the Court held at p. 602:

> "Before Big Bend can sell or dispose of its property, rights or franchises, it must obtain approval of REA. 7 U.S.C. § 907."

Faced with the denial of the transfer of property by the REA Administrator, the plaintiff sought to condemn the facilities pursuant to a Washington statute which is similar to the Louisiana statute under which Morgan City seeks expropriation rights herein. Again, the Ninth Circuit would not permit the condemnation to proceed, and held at p. 603:

> "In the instant case, REA has determined that the PUD's proposed condemnation would decrease the ability of the REA to serve this purpose. PUD disputes this determination, and contends that the proposed condemnation would actually facilitate rural electrification by making the distribution of electricity more efficient. PUD contends that because the issue of the wisdom of the taking is disputed, the District Court erred in granting a summary judgment for the United States and Big Bend. The argument does not follow.
>
> REA is the administrative agency charged by Congress with responsibility for facilitating rural electrification. REA was intended by Congress to determine the appropriate course of conduct to accomplish the legislative purpose. Courts properly give wide latitude to agency determinations in their

> area of expertise. See *National Broadcasting Co. v. Federal Communications Commission*, 516 F.2d 1101, 1122 (D.C. Cir. 1974) 170 U.S. App. D.C. 173, *cert. denied*, 96 S.Ct. 1105, 424 U.S. 910, 47 L.Ed. 2d, 313 (U.S. Dist. Col., 1976), *cert. denied*. This Court will not reverse this sort of agency determination unless it is arbitrary, capricious or an abuse of discretion. See 5 U.S.C. § 706.
>
> REA's determination that the proposed condemnation will interfere with rural electrification in Franklin County must be upheld unless it is shown to be arbitrary or capricious. PUD has not made a showing. We, therefore, affirm the District Court's summary judgment."

The Fifth Circuit has adopted the Ninth Circuit's reasoning and expressly approved the holding and rationale of *Big Bend, supra*, in the case of *City of Madison, Mississippi v. Bear Creek Water Association, Inc.*, 816 F.2d 1057, 1060 (5th Cir. 1987).

It is apparent that the Fifth Circuit Court of Appeals has enforced the Supremacy Clause principles barring municipal condemnations that interfere with federal programs. In *Bear Creek, supra*, a municipality attempted to condemn property of a water association financed, in part, by the Farmers Home Administration under a federal program. The District Court granted the motion for summary judgment filed by the Farmers Home Administration because the water association was indebted to it, and by federal statute, namely 7 U.S.C. § 1926(b), prevented municipal condemnations of property owned by federally indebted water associations.

More importantly, in affirming the District Court, the Fifth Circuit cited, with approval, the opinion of the Ninth Circuit in *Big Bend, supra*, and emphasized that the Supremacy Clause prevents municipalities from condemning property Congress has protected, stating at p. 1060:

> "The case at bar exemplifies the evil Congress wishes to avoid. The association's affidavits showed that the municipalities desire to condemn . . . the most densely populated and thus most

> profitable territory now served by the association. Even if fair value is paid for the loss of the facilities, such an action would inevitably have an adverse effect on the remaining customers . . . in the form of lost economies of scale resulting in higher per-user cost. To allow expanding municipalities to 'skim the cream' by annexing and condemning those parts of the water association with the highest population density (and thus the lower per-user cost) would undermine Congress' purpose of facilitating inexpensive water supplies for farmers and other rural residents and protecting those associations' ability to repay their FMHA debts. See *Big Bend*, 618 F.2d 601 (9th Cir. 1980) (similarly rejecting utility's attempt to condemn property owned by a cooperative financed by REA)."

The two federal statutes involved are similar. In *Bear Creek*, 7 U.S.C. § 1926(b) and in this case, 7 U.S.C. § 907 do not specifically mention the term "condemnation," "eminent domain" or "expropriation." Nevertheless, the Courts have time and again rejected the argument which Morgan City now presents and have been well satisfied that Congress intended to protect the federal programs created by each statute so long as the condemnee owed monies which the Courts and/or the Administrator felt was significant, such that a taking of a part of the system would damage the remaining system and frustrate the underlying federal purpose of the Acts in question.

4. IN ADDITION TO THE STATUTORY BASIS FOR DENYING THE EXPROPRIATION, THERE IS ALSO A FRUSTRATION OF FEDERAL PURPOSE UNDER THE PREEMPTION DOCTRINE

The Supreme Court has explained that, under the Supremacy Clause, a federal statute may preempt state law in several different ways. *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355, 368-369, 106 S.Ct. 1890 (1986); *Michigan Canners and Freezers Association v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 469, 104 S.Ct. 2518 (1984); *Pacific Gas & Electric Co. v. State Energy*

Resources Conservation and Development Commission, 461 U.S. 190, 203-204, 103 S.Ct. 1713 (1983); *Fidelity Federal Savings and Loan Association v. Delacuesta*, 458 U.S. 141, 152-153, 102 S.Ct. 3014 (1982).

Under conflict preemption, which is the applicable type here, state law is displaced to the extent that it conflicts and is inconsistent with a federal statute. Conflict preemption may occur in two ways. First, a provision of state law may be incompatible with a federal statute in the sense that it is impossible for a person to comply with both. However, even if state and federal law are not incompatible in this sense, a particular application of state law is still preempted if it would disturb, interfere with or seriously compromise the purposes of the federal statutory scheme. *California v. FERC*, 495 U.S. 490, 506, 1105 S.Ct. 2024 (1990), *rehearing denied*, 497 U.S. 1040 (1990). Under the latter aspect of conflict preemption, an application of state law that would frustrate the purposes of a federal statute is preempted. *Pacific Gas & Electric Co.*, 461 U.S. at 220-221; *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 389, 103 S.Ct. 1905 (1983). In *Arkansas*, the court noted that a particular application of state law that would "seriously compromise important federal interest" would be "implicitly preempted by the Rural Electrification Act."

This Court has indicated that there is no litmus test or formula for determining whether a particular application of state law would frustrate the purposes of a federal statute so as to give rise to preemption. Rather, the inquiry turns on the circumstances of the particular case, and the crucial question is whether the application of state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Thus, in *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404 (1941), this Court reached the following conclusion:

> "This Court, in considering the validity of state laws and in light of treatises or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability;

> inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear, distinctly marked formula. Our primary function is to determine whether, under the circumstances of the particular case, state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Thus, if a particular application of a state law would interfere with the operation of a federal statute, it is preempted under the Supremacy Clause even if the federal enactment does not by its terms preempt any state law.

Further, preemption by frustration of purpose does not depend on Congress' having fully occupied the field. Even if Congress does not fully occupy a field, a particular application of state law that would interfere with the operation of the federal program is preempted. See *Michigan Canners & Freezers Association*, 467 U.S. at 469-470 and *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-526 (1977), *rehearing denied*, 431 U.S. 925, 97 S.Ct. 2201, 97 S.Ct. 1305.

This Court has also held that the focus of the frustration inquiry is on the "practical effect" that the state law would have on the federal scheme. *Michigan Canners & Freezers Association*, 467 U.S. at 478 and *Jones v. Rath Packing Co.*, 430 U.S. at 526.

When this federal frustration doctrine is considered in the light of one-sided, state expropriation statutes which permit municipalities to "skim the cream" of the co-ops' best federally financed customers, federal courts have been unanimous in holding that under the Supremacy Clause of the Constitution, a state municipal public utility cannot condemn property owned by a federally subsidized utility where the condemnation would interfere with the federal purpose of the Rural Electrification Act. *Public Utility District No. 1 of Franklin County v. Big Bend Electric Cooperative, Inc.*, 618 F.2d 601, 603 (9th Cir. 1980); *Public Utility District No. 1 of Pend Oreille County v. United States*, 417 F.2d 200 (9th Cir. 1969).

In both cases, the Ninth Circuit reasoned that the proposed condemnation of a particular portion of a federally subsidized rural electric system, even if compensated for under state law (which is something Morgan City even failed to do in this case), would impair Congress' objective of providing reliable, low cost electric service to rural America, because removal of the targeted portion of the system would weaken the remainder of the system and lessen its ability to function effectively:

> "This is not an ordinary case because what is sought to be taken here is part of a system and even if the part taken is paid for, and if an award is made for the damage to the remaining portion, a question remains as to the capacity of the remaining portions of the system to function."

Significantly, the Ninth Circuit also held that the Rural Electrification Administration's reasoned assessment that a proposed condemnation of rural cooperative property is likely to frustrate the purposes of the federal program "must be upheld unless it is shown to be arbitrary or capricious." *Big Bend*, 618 F.2d at 603. The Ninth Circuit explained:

> "REA is the administrative agency charged by Congress with responsibility for facilitating rural electrification. REA was intended by Congress to determine the appropriate course of conduct to accomplish the legislative purpose. Courts properly give wide latitude to agency determinations in their area of expertise . . . This Court will not reverse this sort of agency determination unless it is arbitrary, capricious, or an abuse of discretion. See 5 U.S.C. § 706; *Big Bend*, 618 F.2d at 603."

The Fifth Circuit has obviously followed this reasoning in the present case as it had also done in the matter of *City of Madison v. Bear Creek Water Association, Inc.*, 816 F.2d 1057 (5th Cir. 1987). In embracing the Supremacy Clause principles of frustration of a federal purpose, the Fifth Circuit reasoned as follows:

> "Even if fair value is paid for the lost facilities, such an action would inevitably have an adverse effect on the remaining customers . . . in the form of

> lost economies of scale and resulting higher per user costs. To allow expanding municipalities to 'skim the cream' by annexing and condemning those parts of a rural utility with the highest population density and thus the lowest per user cost, would undermine Congress' purpose of facilitating inexpensive water supplies for farmers and other rural residents and protecting those associations' ability to repay their federal debts. See *Public Utility District No. 1 of Franklin County v. Big Bend Electric Cooperative, Inc.*, 618 F.2d 601 (9th Cir. 1980); *Bear Creek*, 816 F.2d at 1060."

Turning to the factual record in this case, the crucial document is the REA's Administrator's 28 page, single-spaced Decision[5] with approximately 300 additional pages of support data and computations independently reviewed by that agency in comprehensive detail. The agency determined that Morgan City's proposed expropriation of the targeted portion of the SLECA system would frustrate the purposes of the rural electrification program enacted by Congress. The factual basis underlying the agency's decision is undisputed, particularly the core underpinnings of the REA's determination which warrant the conclusion that this expropriation would frustrate important federal interest under the Rural Electrification Act. Specifically at p. 9[6] of its Decision, the REA said this:

> " . . . A copy of the preliminary analysis prepared by the Financial Services Staff to determine the effect the expropriations could have on CAJUN is attached as Exhibit "B". The preliminary analysis indicated that in 1992, the combined Morgan City *Phases II* and *III* expropriations would result in gross lost revenue from SLECA of $768,000 *annually*, and net lost revenue of $535,000 *annually* to CAJUN."

---

[5] Petitioner's Appendix, p. 37a-75a

[6] App. 49a

With this enormous "cream skimming" exposed by the REA staff, the Administrator reached the following results and conclusions beginning at p. 24[7] of The Decision as follows:

> "In addition to the detrimental effect on the payment of federal debt, the effect of the *Phase II* expropriation *frustrates the objectives of the REA Program in Louisiana by increasing the likelihood of rate increases."* (Emphasis added). As stated above, great effort has been put into lowering the rural electric rates in Louisiana so that they are supportable by the local economy and more competitive with local utilities. REA has agreed to a major reduction in CAJUN's current debt service payments, to effectuate a wholesale rate reduction in an attempt to improve the viability of the Louisiana Rural Electric Cooperative System. The Morgan City *Phase II* expropriation, at a minimum, undermines that effort."

At p. 25,[8] the Administrator continues:

> "The proposed expropriation must be evaluated in the light of the interests of the REA and the federal taxpayer in carrying out the RE Act objective of providing reliable electric service in rural areas as low as is practical, in maintaining and improving the financial stability of borrowers, and protecting the feasibility of and security for outstanding loans, and in assuring that outstanding REA loans will be repaid."

At p. 26,[9] the Staff and Administrator reached this conclusion:

---

[7] App. 71a

[8] App. 72a

[9] App. 73a

> "Any further deterioration in the financial condition of SLECA, CAJUN and the other distribution members will *frustrate the RE Act objective* of developing and maintaining the financial strength of the REA borrowers." (Emphasis added)

At p. 26,[10] the Staff and Administrator continue their findings and conclusions as follows:

> "Any loss of high density/high growth or high margin/service producing service territory will have a long-term, adverse impact on SLECA . . . It is clear that there will be a reduction in the amount of payment received by REA on the B Note, as a result of load loss by CAJUN, and that the interests of REA and the federal taxpayer, in maximizing recovery on outstanding loans will be *frustrated*." (Emphasis added.)

At the bottom of p. 26,[11] the Staff and Administrator continue with their report and decision when it is stated that:

> "The loss of any of this property and service rights would *frustrate* the objectives of the Act to provide electric service at reasonable rates, to develop the financial strength of REA borrowers, to maintain the feasibility of and security for outstanding loans and to insure that outstanding loans are repaid."

At p. 27[12] of The Decision, the Staff concludes and recommends the following:

> "For the reasons summarized above, we believe that the disposition of the SLECA property, including *Phase II* and *Phase III* proposal of Morgan City and the proposal of the City of Houma is contrary to the interests of REA and would *frustrate* the objectives of the RE Act. Therefore, we recommend that, under Section 7 of the RE Act, you withhold approval of the disposition pursuant to expropriation action."

---

[10] App. 73a

[11] App. 74a

[12] App. 74a

Thus, the substantial record in this case, which exceeds 12 volumes, the findings of the REA Administrator, the decision of the trial judge, Honorable Rebecca F. Doherty, and the Decision of the Fifth Circuit Court of Appeals, including its per curiam decision, clearly support a finding of frustration of a federal purpose and, thus, under the application of conflict preemption, an application of state law that would frustrate the purposes of a federal statute is preempted.

5. THERE IS NO GENUINE ISSUE OF MATERIAL FACT IN THIS CASE AND THE MOTION FOR SUMMARY JUDGMENT GRANTED BY THE COURTS BELOW MUST STAND

The summary judgment procedure authorized by Rule 56 is a method for promptly disposing of actions in which there is no genuine issue as to any material fact or in which only a question of law is involved. Thus, parties need not wait until their case is fully tried but may seek a final adjudication of the action by a motion under Rule 56. In this way, dilatory tactics resulting from the assertion of unfounded claims or the interposition of specious denials or sham defenses can be defeated. Parties may be accorded expeditious justice, and some of the pressure on court dockets may be alleviated. *Simmons v. McGuffey Nursing Home, Inc.*, 619 F.2d 369, 371 (C.A. 5th 1980, Quoting *Wright & Miller*).

Hence, the courts search for *genuine* issues of fact, not any issues of fact, because the rule is intended to prevent vexation and delay, improve the machinery of justice, promote the expeditious disposition of cases, and avoid unnecessary trials when no genuine issues of fact have been raised or can be supported. *Wright & Miller*, Volume 10, Page 564, 1983; *Slaughter v. Allstate Insurance Company, et al*, 803 F.2d 857 (5th Cir. 1986); and *Washington v. Armstrong World Industries, Inc.*, 839 F.2d 1121 (5th Cir. 1988). "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually insupportable claims," *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986), *on remand*, 826 F.2d 33 (1987), *cert. denied*, 484 U.S. 1066, 108 S.Ct. 1028, 98 L.Ed.2d 992

(1988), thereby permitting courts to avoid "protracted, expensive and harassing trials." *Mieri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985), *cert. denied*, 474 U.S. 829, 106 S.Ct. 91, 88 L.Ed.2d 74 (1985).

Thus, the Supreme Court has reaffirmed the value of pretrial resolution of cases in appropriate circumstances. See *Celotex Corp. v. Catrett*, *supra*; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). As the Supreme Court noted in *Celotex*: "Summary Judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.' " 477 U.S. at 327, 106 S.Ct. 15 2555 (quoting Fed. R. Civ. P. 1).

The core undisputed facts of this case are as follows:

1. Morgan City seeks to expropriate a dense portion of a federally-subsidized utility;
2. *Phase I* of the expropriation has occurred and did not affect SLECA customers; *Phase II* of the annexation has occurred and does affect at least 252 of SLECA's best customers;
3. *Phase III* will occur and affects an additional 270 SLECA customers according to the sworn testimony of Morgan City's own officials and witnesses, namely its mayor, the Honorable Cedric LaFleur, and its expert, Harold J. Beard. Judge Doherty's decision accepts the testimony of Mayor LaFleur and Mr. Beard;[13]
4. There may be other expropriations commenced by other municipalities, namely the City of Houma, which while not controlling, cannot be ignored because an additional 602 SLECA customers would be involved;
5. After a considerable period of negotiation, Morgan City offered to SLECA the sum of

---

[13] App. 14a; 837 F.Supp. 195, 197

$895,955.78, to be paid over a period of eight years in the amount of $111,994.47 per year;

6. The foregoing offer is, in essence, an interest-free loan because no interest is included in the eight-year payout;
7. At the time of the REA staff report and the decision of the Administrator, SLECA, in round numbers, owed approximately $35 Million, of which $25 Million was owed to REA and the remainder to CFC;
8. At the time of the same report, CAJUN owed REA between $3.2 and $3.5 Billion;
9. Morgan City at no time made any offer to CAJUN;
10. SLECA, CAJUN and the overall integrated rural system in Louisiana are in poor financial health. CAJUN, so as to meet its debt obligations, required a large debt restructuring agreement, which occurred in 1990;
11. SLECA purchases all of its power requirements from CAJUN through an all-requirements wholesale power contract that extends through December 31, 2026;
12. SLECA, as did all rural cooperatives, obtained a 99-year franchise when SLECA was created in 1938. This franchise was obtained from St. Mary Parish and includes the area being expropriated. REA assumed a 45-year life at the time of its decision regarding that franchise;
13. If the expropriation is permitted to occur against the wishes of the Administrator, SLECA would be stripped of its high-density, high-profit service area and would be less able to provide adequate service to its low-density, low-profit, more rural areas; and
14. The REA Administrator and his staff found that the expropriation would frustrate the objectives of the RE Act.

6. EVEN STATE COURTS HAVE NOT UNIFORMLY REJECTED THE REA'S FRUSTRATION THEORY

As noted earlier in this brief, at least two state courts *Public Utility District No. 1 v. Inland Power & Light Company*, *supra* and *City of Fairbanks v. Electric Distribution System*, *supra*, have agreed with the holdings of the Ninth and Fifth Circuits regarding unilateral expropriation actions which permit "cream skimming." Furthermore, the two cases cited by petitioner in its brief at p. 14 and p. 15 are distinguishable and inapposite from the issue decided by the courts below. For example, *City of Rochester v. People's Co-op Power Association, Inc.*, 505 N.W. 2d 621 (Minn. App. 1993) was a case with manifestly different facts than this one. Specifically, the trial court in that case at 483 N.W. 2d 477, No. C090281, Minn. 3d JDC, Homestead County, noted as did Judge Doherty, App. 19a:

> "There is no evidence that the REA Administrator has determined that the proposed condemnation would decrease the ability of the REA to achieve the purposes of the Rural Electrification Act. Apparently, in the almost three years since this action began, the Administrator has conducted no analysis, economic or otherwise, to determine what the effect would be on People's or the rural electrification system if People's loses the right to service some of its facilities within the Willow Creek Sanitary Sewer District and the incinerator site within that district."

Here, however, the Administrator, unlike the *Minnesota* case, has performed an exhaustive, independent analysis of the forced expropriation and has reviewed not only its own staff's findings and conclusions, but that of two independent engineering firms, all of which have unanimously determined that the taking would be harmful to SLECA, CAJUN and the REA. Based on this finding, it is the duty of the Administrator to prevent such damage. In the *Minnesota* case, for whatever reason, the Administrator had not made such a study and analysis and, therefore, the court was correct in concluding that there was no basis to prevent the taking. In other words,

the court would not consider a mere *facial challenge*[14] with no record to support it.

7. THE DECISION OF THE COURT OF APPEALS IS NOT INCONSISTENT WITH THIS COURT'S PREEMPTION DECISIONS

Respondent rests its hopes on this Court granting a writ of certiorari by citing several cases which it says are controlling, among them, *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 103 S.Ct. 1713 (1983); *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 389, 103 S.Ct. 1905 (1983); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448 (1979), *on remand*, 600 F.2d 478 (1979); and, *Wabash Valley Power Association, Inc. v. Rural Electrification Administration*, 903 F.2d 445 (7th Cir. 1990).

Those cases are clearly distinguishable and, in fact, support the panel's decision below.

1. *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, supra

The *Arkansas* case was not an expropriation case, it was a rate case and a hypothetical one at that. The case concerned the issue of who had jurisdiction to set rates, the state of Arkansas or the REA. At the outset, the Supreme Court noted at p. 1909 of its decision that:

> "Where a statute regulates *evenhandedly* to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

As this Court knows, however, state expropriation statutes are anything but evenhanded. In fact, the statute in

---

[14] App. 28a. The Fifth Circuit per curiam Decision held correctly that "SLECA does not assert a facial challenge . . . "

question does not consider any of the rights or arguments of the parties to be expropriated. Furthermore, the Supreme Court at p. 1915 of its *Arkansas* decision recognized that a particular rate set by the Arkansas PSC may so seriously compromise important federal interests including the ability of the AECC to repay its loans, as to be implicitly preempted by the Rural Electrification Act. The court said this:

> "We will not, however, in this *facial challenge* to the PSC's near assertion of jurisdiction, assume that such a hypothetical event is so likely to occur as to preclude the setting of any rates at all."

Thus, the *Arkansas* case was primarily a jurisdictional battle, and in large measure, a hypothetical case because the state Public Service Commission had not yet set any rates which damaged the Arkansas utility or the REA. In effect, the REA's concerns were found to be premature. Yet we do glean one thing from the *Arkansas* court, and that is that there is a role for frustration of federal purpose if the specific situation is one where interference with the federal interest can be shown. This is similar to the "case by case" analysis which the Supreme Court orginally set down in *Hines v. Davidowitz, supra.*

2. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, supra

This case involved a contest between a state energy commission which concerned itself with permitting regarding the disposal of nuclear waste materials in the State of California vis-a-vis the Nuclear Regulatory Act. The Court simply found that because the state regulatory commission was directed to make determinations of the suitability of storage facilities on a "case by case basis" before granting a permit for the construction of any additional nuclear power plants, and because there was no way to know whether the commission would ever find a nuclear plant storage capacity to be inadequate, the challenge to the statutory requirement based on a claim of preemption was not ripe for adjudication and was obviously once again premature. P. 1721.

Nevertheless, the Supreme Court clearly recognized the doctrine of frustration of purpose but simply found that the issue was not ripe for adjudication because the state of California had not yet done anything to conflict with federal law. In this case, however, Morgan City has filed an expropriation suit and offered a totally insufficient type of compensation thus interfering with SLECA and CAJUN's ability to repay its debt and making the matter ripe for adjudication.

3. *United States v. Kimbell Foods, Inc.*, supra

This is a case involving the Farmer's Home Administration as the holder of a security interest in certain debtor crops and farm equipment which conflicted with a state's mechanic lien in the sum of $543.81. The case has nothing to do with expropriation law and is not applicable to the case at bar.

4. *Wabash Valley Power Association v. Rural Electrification Administration*, supra

In this case, the REA sought a declaratory judgment in support of its action to unilaterally increase a cooperative's wholesale electric rates without a cost of service study, rate study, hearing or any administrative action or finding. In essence, REA, in a letter written to Wabash and the regulatory officials of the states of Indiana and Michigan, determined that by simply writing a letter that it had the authority to set rates for the generating and transmission company and the entire state of Indiana. Naturally, the court rejected this type of action and this writer certainly recognizes that it is not good policy for anyone, be it REA, the Public Service Commissions or any party to unilaterally set utility rates affecting millions of customers with the stroke of a pen in the form of a letter. Again, however, the Morgan City expropriation case is not about writing letters which unilaterally set rates. A careful review of the *Wabash* case will reveal that the REA had no statutory authority to write the subject letter to Wabash and the state regulators raising rates on its own. In this case, however, there is a statutory basis which leads to the preemption because of the frustration of a federal purpose, namely 7

U.S.C. § 907, which has been previously recognized and adopted by the federal courts in *Pend Oreille*, *Big Bend*, *Bear Creek* and by the courts below in this case. Finally, a careful reading of *Wabash* will reveal that at p. 456 and p. 457, the Court notes that:

1. REA failed to place into evidence in the courts below that which would support the theory which it was attempting to assert; and that

2. REA had failed to ask for the appointment of a trustee.

Having failed to take the necessary steps in the proceeding, the Court was in no mood to permit a bare bones letter from REA to Wabash, the bankruptcy court and the Public Service Commissions of Indiana and Michigan to decide the issue of rates in those states.

CONCLUSION

The panel's decision below is correct and need not be considered by this Court. The federal government, when acting within the confines of its statutory and/or constitutional authority, is empowered to preempt state law to the extent necessary to achieve a federal purpose particularly when the state law obviously and clearly conflicts with federal law. 7 U.S.C. § 907; Constitution of the United States, Article VI, Cl. 2. It is obvious from the record that the decision of the Court below clearly supports conflict preemption. The Fifth Circuit correctly recognized that the critical question was whether or not Louisiana's expropriation law, which is unilateral in nature, would frustrate the federal purpose underlying the REA Act and, hence, conflict with it. While there is no one perfect litmus test for this determination, it is clear from the record in this case that Morgan City's attempt to gain an interest-free loan and, therefore, a federal subsidy for itself by taking the most profitable, densely situated customers of SLECA in the age-old game of "cream skimming"

could not be allowed to stand. The petition for writ of certiorari should be denied.

Respectfully Submitted:

JAMES M. FUNDERBURK, # 5785
DUVAL, FUNDERBURK, SUNDBERY & LOVELL, L.L.P.
101 Wilson Avenue
P. O. Box 3017
Houma, Louisiana 70361
(504) 876-6410
Attorney for Respondent

July 25, 1995

Supreme Court, U.S.
FILED
JUL 28 1995
CLERK

No. 94-2135

In The

Supreme Court of the United States

October Term, 1995

CITY OF MORGAN CITY,

Petitioner,

versus

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, CAJUN ELECTRIC POWER COOPERATIVE, INC., AND THE UNITED STATES OF AMERICA, through the RURAL UTILITIES SERVICE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT, CAJUN ELECTRIC POWER COOPERATIVE, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

By Attorneys,

JOHN SCHWAB
WILLIAM E. HODGKINS
JAMES L. ALCOCK, JR.
SCHWAB & WALTER
10636 Linkwood Court
Baton Rouge, LA 70810
Telephone: 504/767-1460

Attorneys for Respondent, Cajun Electric Power Cooperative, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether Louisiana's expropriation law, based on the facts of this case as applied and interpreted, frustrates the federal purpose underlying the Rural Electrification Act ("REAct").

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 8

ARGUMENT 9

I. THE COURT OF APPEALS' DECISION FOLLOWS ESTABLISHED, UNIFORM FEDERAL JURISPRUDENCE 9

II. THE COURT BELOW HAS NOT DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH A STATE COURT OF LAST RESORT 12

III. THE DECISION OF THE COURT OF APPEALS IS IN HARMONY WITH THIS COURT'S PREEMPTION DECISIONS 16

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES:

Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 103 S.Ct. 1905, 76 L.Ed.2d (1983) 14, 17, 18, 19

City of Madison, Mississippi v. Bear Creek Water Association, Inc., 816 F.2d 1057 (5th Cir. 1987)..... 11, 12, 13

City of Rochester v. Peoples Co-Op Power Assn., Inc., 505 N.W.2d 621 (Minn. App. 1993)..... 14

City of Stillwell v. Ozarks Rural Elec. Coop. Corp., 870 F.Supp. 1025 (E.D. Okla. 1994)..... 15

Decatur County Rural Elec. Membership Corp. v. Public Serv. Co., 261 Ind. 128, 301 N.E.2d 191 (1973)..... 12, 13

Greensboro Lumber Company v. Georgia Power Company, 643 F.Supp. 1345 (N.D. Ga. 1986), aff'd., 844 F.2d 1538 (11th Cir. 1988)..... 4

Hines v. Davidowitz, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941)..... 7, 16, 20

Pacific Gas & Elec. Co. v. State Energy Resources and Dev. Comm'n, 461 U.S. 190 (1983) 20, 21, 22

Public Utility District No. 1 of Franklin County v. Big Bend Electric Cooperative, Inc., 618 F.2d 601 (9th Cir. 1980) 10, 11, 13

Public Utility District No. 1 of Pend Orielle County v. United States of America, 417 F.2d 200 (9th Cir. 1969)..... 9, 10, 13

Town of Coushatta v. Valley Electric Member. Corp., 130 So.2d 822 (La. App. 2d Cir. 1962), on rehearing..... 19

TABLE OF AUTHORITIES – Continued

Page

Tri-State Transmission Association, Inc. v. Shoshone River Power, Inc., 874 F.2d 1346 (10th Cir. 1989) . . . 3, 5

U. S. v. Kimbell Foods, Inc., 440 U.S. 715 (1979) 19

STATUTES:

7 U.S.C. § 901 3

7 U.S.C. §§ 904 and 913 13

7 U.S.C. § 907 13

LSA-R.S. 19:102 5

REGULATIONS AND OTHER RULES:

7 C.F.R. § 1710.12(b)(5) 18, 19

Rule X, Rules of the Supreme Court 2

STATEMENT OF THE CASE

Petitioner herein, the City of Morgan City ("Morgan City") seeks a Writ of Certiorari from this Honorable Court to review the United States Court of Appeals for the Fifth Circuit's decision upholding the district court's grant of a summary judgment in favor of respondents, Cajun Electric Power Cooperative, Inc. ("Cajun"), South Louisiana Electric Cooperative Association ("SLECA"), and the United States of America, acting through the Administrator, Rural Electrification Administration (the "United States" or "REA").[1]

The Fifth Circuit held that, based upon the facts of this case, the proposed state law condemnation, which in determining the necessity of the proposed taking did not consider the potential prejudice to rural electricity consumers served by federally funded cooperatives, would frustrate the federal purpose of providing low cost, reliable electric service to rural areas and that therefore the state law condemnation proceeding was preempted under the supremacy clause of the United States Constitution. 31 F.3d at 324; A.11a. In a per curiam opinion, the circuit panel denied rehearing, but did take the opportunity to further address certain arguments raised by Morgan City. 49 F.3d at 1074; A.24a-27a. A suggestion for rehearing en banc was also denied. 49 F.3d at 1074; A.27a.

---

[1] During the pendency of this proceeding, Congress created a new federal agency, the Rural Utilities Service, to which the task of administering the Rural Electrification Act was delegated. The caption of the instant petition reflects this change.

In its petition filed herein, Morgan City apparently concentrates on the following two Considerations Governing Review on Writ of Certiorari, articulated in Rule X, Rules of the Supreme Court of the United States as follows:

> (a) (i) When a United States court of appeals . . .
>
> (ii) has decided a federal question in a way in conflict with a state court of last resort; or
>
> * * *
>
> (c) When a state court or a United States court of appeals . . . has decided a federal question in a way that conflicts with applicable decisions of the Supreme Court.

Although it is understood that the writ grant considerations listed are not the exclusive factors used by the Court in determining whether to review a lower court decision, they do provide a proper framework for responding to Morgan City's request in this case.

Without delving into the full procedural history of this proceeding, Morgan City filed an expropriation suit against SLECA in state court seeking to condemn certain utility customers and equipment of SLECA in a recently annexed area of the city. After Cajun intervened and the United States was made a third party defendant in the action, the case was removed to the United States District Court for the Western District of Louisiana. The district judge granted a Motion to Dismiss or in the Alternative for Summary Judgment in favor of SLECA, Cajun and the United States, holding that, based on the undisputed facts

in the record, Morgan City's attempted expropriation was preempted. The United States Court of Appeals for the Fifth Circuit affirmed the district court and subsequently denied rehearing and a suggestion for rehearing en banc.

In order to fully understand the holding of the Fifth Circuit on appeal, as well as the ruling of the district court, an understanding of the REA program, its interests and historical development is necessary. In 1936, Congress enacted the Rural Electrification Act, 7 U.S.C. § 901 et seq. ("REAct"), which instituted a program designed to provide electric power to rural America. Congress was concerned that those engaged in the business of generating electrical energy, namely, for-profit, investor-owned utilities and municipal utilities, had failed to extend electric service to the rural communities of America because to do so was unprofitable due to the low density of consumers in rural areas. Congress determined that the *national interest* would be served by subsidizing rural users of electricity as an incentive to provide for electric service in such areas. The REAct created the Rural Electrification Administration and authorized it to make and guarantee loans to enable rural communities to obtain electric power. *Tri-State Transmission Association, Inc. v. Shoshone River Power, Inc.*, 874 F.2d 1346 (10th Cir. 1989).

Pursuant to Louisiana's Electric Cooperative Law and with REA financing in the form of low interest loans and loan guarantees, rural areas across Louisiana, previously unable to obtain central station electrical service, began to form electric distribution cooperatives to distribute electric power purchased from investor-owned utilities to the member/owners. Ultimately, the investor-

owned utilities, faced with a shrinking long-term wholesale power supply due to load growth, as well as, a growth in the distribution cooperatives' needs, informed the cooperatives that they would be unable to continue supplying all of the electric cooperatives' power requirements.

In response, distribution cooperatives, including SLECA, banded together to form a corporation, Cajun, which generates and transmits the power sold at retail by its member/owner distribution cooperatives. In essence, generating and transmission cooperatives ("G&T's"), such a Cajun, were a direct response to a vital fact of the electric industry, known to Congress when the REAct was passed in 1936, and which has grown in importance with technological developments – viz., that the cost of power from a generating plant constructed by a typically small REA-financed rural electric distribution system would, in general, be prohibitively high. *Greensboro Lumber Company v. Georgia Power Company*, 643 F.Supp. 1345 (N.D. Ga. 1986), aff'd., 844 F.2d 1538 (11th Cir. 1988).

REA requires, in order to provide the long-term capital needed for the construction of the costly G&T facilities, that the distribution cooperatives which comprise the G&T enter into all-requirements contracts with the G&T. These contracts require the G&T's members to purchase and receive from the G&T, all electric power and energy which the member cooperatives require for the operation of their systems.

These contracts secure a long-term source of power for the member cooperatives, assure a suitable market for the power produced by the G&T, and provide a long-term

revenue stream from which the G&T can repay obligations incurred by it on behalf of its members. Because all-requirements contracts allow the REA and the financial market to view the G&T and its member distribution cooperatives as an integrated whole, reasonable and necessary financing can be made available to the G&T although it operates on a small equity margin. *Tri-State, supra.* Effectually, the all-requirements contracts place the financial strength of the distribution cooperatives, such as SLECA, behind the G&T's loans and are the lynch-pin of the entire REA program.

In Cajun's case, the federal government, through REA, has either loaned directly or guaranteed loans to Cajun of approximately $3.2 billion. The federal government's security for such loans is limited to the assets of Cajun and the revenue stream resulting from the sale of the electric power, generated by the facilities constructed by Cajun, to its member/owner distribution cooperatives, including SLECA, under all-requirements wholesale power contracts. Loans for the construction of multi-million dollar generating plants were made on the basis of the existing load and anticipated future load of SLECA and Cajun's other member distribution cooperatives and with the expectation that those loads would continue and grow in order to generate the revenue stream necessary to repay the loans.

In contrast to the goals of the REAct detailed above, Louisiana's expropriation law provides generally that any Louisiana municipality may expropriate property whenever necessary for the public interest as determined by the governing authority of the municipality or by a trial judge when the taking is contested. LSA-R.S. 19:102.

In this particular case, the REA administrator submitted an affidavit, in which, based on very detailed reports from two outside experts as well as an REA staff report, he concluded that this attempted condemnation would jeopardize the federal rural electrification program since allowing Morgan City to condemn the customers and facilities at issue herein would pave the way for already planned piecemeal erosion of other high density service areas adjacent to Morgan City and another nearby city, Houma. The proposed actions could well leave SLECA, as well as Cajun, both REA financed, financially unable to continue service to the remaining low-density areas not targeted by municipally-owned or investor-owned utilities.

The REA administrator's affidavit, in conjunction with the other affidavits submitted in support of Respondents' Motion to Dismiss or in the Alternative for Summary Judgment established the following core facts upon which the lower court based its decision:

(1) Cajun is a generation and transmission cooperative which provides wholesale power and energy to electric distribution cooperatives in Louisiana, including SLECA;

(2) SLECA is required to purchase all of its electric power and energy requirements from Cajun pursuant to an all-requirements wholesale power contract;

(3) Cajun has federal loans and loan guarantees of in excess of $3 billion and SLECA has federal loans and loan guarantees of approximately $35 million;

(4) Cajun currently owns generating capacity in excess of the amount needed to meet its members' load requirements;

(5) Cajun is a financially troubled generation and transmission cooperative which has entered into a workout agreement with the REA;[2]

(6) The portion of SLECA's system which Morgan City seeks to expropriate is one of the most dense and most profitable portion's of SLECA's system;

(7) Morgan City's proposed expropriation would result in a decrease in SLECA's and Cajun's power and energy sales revenue and require fixed costs to be allocated over a smaller customer base, thus increasing rates to the remaining customers.

The Fifth Circuit, based on the purpose of the REAct, Louisiana's expropriation law, the specific undisputed facts of this case, and prior precedent correctly held that Morgan City's proposed expropriation was preempted because if it were "allowed to stand, 'it would stand as an obstacle' to the repayment of federal loans, to the financial viability of federally financed electric cooperatives, and ultimately to the maintenance of electricity service to rural areas." 31 F.3d at 324; A.12a., citing *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).

Morgan City, in its petition, has simply restated its argument made to the Fifth Circuit originally and in its

---

[2] On December 21, 1994, Cajun filed a voluntary petition for relief under Chapter 11, Title 11, United States Code.

Application for Rehearing and Suggestion for Rehearing En Banc. The lower courts' opinions correctly determine the issues presented and it is respectfully submitted that a writ should not be granted in this case for the reasons detailed hereinbelow.

SUMMARY OF ARGUMENT

The Fifth Circuit, based on the purpose of the REAct, Louisiana's expropriation law, the specific undisputed facts of this case, and prior precedent correctly held that Morgan City's proposed expropriation was preempted based on frustration of federal purpose. Federal jurisprudence is uniform in recognizing that a proposed state law based condemnation which seeks to condemn the more densely populated and thus more profitable segments of a federally financed rural cooperative's system to the substantial detriment of the remainder of the system is frustrative of the federal purposes underlying the REAct.

Morgan City's argument that two state court decisions conflict with the Fifth Circuit's decision upholding preemption is erroneous. Neither of the two state court decisions cited by Morgan City were grounded in a fact specific determination as to frustration of federal purpose and are therefore distinguishable from the instant case.

Similarly, Morgan City's argument that the Fifth Circuit's opinion conflicts with *Arkansas Electric* is in error, as this case does not present a facial challenge to the municipality's right to expropriate the property in question. Further, as demonstrated, *Kimbell Foods* does not conflict with the opinion herein and, in fact, is not even

instructive on the issue decided. Finally, *Pacific Gas's* fact specific holding is instructive as to the methods of preemption, but is factually dissimilar. Therefore, Morgan City has presented this Court with no compelling reason to review the Fifth Circuit's decision and its Petition for Writ of Certiorari should be denied.

ARGUMENT

I. THE COURT OF APPEALS' DECISION FOLLOWS ESTABLISHED, UNIFORM FEDERAL JURISPRUDENCE.

As discussed by the Fifth Circuit in its original opinion as well as its per curiam denial of rehearing, federal jurisprudence is uniform in recognizing that a proposed state law based condemnation which seeks to condemn the more densely populated and thus more profitable segments of a federally financed rural cooperative's system (i.e., the "cream" of the system) to the substantial detriment of the remainder of the system is frustrative of the federal purposes underlying the REAct.

The Ninth Circuit in *Public Utility District No. 1 of Pend Orielle County v. United States of America*, 417 F.2d 200 (9th Cir. 1969), in reversing the judgment of the lower court with directions to dismiss the action, stated:

> Congress has declared the federal purpose to electrify the American farm. No matter how we characterize the vehicle which gets the electricity there, a state law so written that a state-favored utility can by its unilateral action interfere with the federal purpose cannot stand

> under the supremacy clause of the Constitution of the United States.

Pend Orielle, 417 F.2d at 202.

Similarly, in *Public Utility District No. 1 of Franklin County v. Big Bend Electric Cooperative, Inc.*, 618 F.2d 601 (9th Cir. 1980), the Ninth Circuit reasoned:

> The purpose of the Act is to provide low cost electricity to rural America. *Public Utility District No. 1 of Pend Orielle County, supra*, 417 F.2d at 202.
>
> In the instant case REA has determined that the PUD's proposed condemnation would decrease the ability of the REA to serve this purpose. PUD disputes this determination, and contends that the proposed condemnation would actually facilitate rural electrification by making the distribution of electricity more efficient. PUD contends that because the issue of the wisdom of the taking is disputed, the district court erred in granting a summary judgment for the United States and Big Bend. The argument does not follow.
>
> REA is the administrative agency charged by Congress with the responsibility for facilitating rural electrification. REA was intended by Congress to determine the appropriate course of conduct to accomplish the legislative purpose. Courts properly give wide latitude to agency determinations in their areas of expertise. See *National Broadcasting Co. v. Federal Communications Commission*, 516 F.2d 1101, 1122 (D.C. Cir. 1974), cert. denied, sub nom. *Accuracy in Media, Inc. v. National Broadcasting Co.*, 424 U.S. 910 (1976). This court will not reverse this sort of

> agency determination unless it is arbitrary, capricious, or an abuse of discretion. See 5 U.S.C. at 706.

Big Bend, 618 F.2d at 603.

Additionally, the Fifth Circuit, in *City of Madison, Mississippi v. Bear Creek Water Association, Inc.*, 816 F.2d 1057 (5th Cir. 1987), cited *Big Bend, supra*, with approval in prohibiting the expropriation of property of a federally subsidized rural water utility. The Court, recognizing the problem associated with piecemeal takings of federally subsidized rural utilities, stated:

> The case at bar exemplifies the evil Congress wished to avoid. Bear Creek's affidavits showed that Madison desires to condemn 60% of its facilities and 40% of its customers, including the most densely populated (and thus most profitable) territory now served by Bear Creek. Even if fair value is paid for the lost facilities, such an action would inevitably have an adverse effect on the remaining customers of Bear Creek, in the form of lost economies of scale and resulting higher per-user costs. To allow expanding municipalities to "skim the cream" by annexing and condemning those parts of the water association with the highest population density (and thus the lowest per-user costs) would undermine Congress's purpose of facilitating inexpensive water supplies for farmers and other rural residents and protecting those associations' ability to repay their FMHA debts. See *Public Utility District No. 1 of Franklin County v. Big Bend Electrical Cooperative, Inc.*, 618 F.2d 601 (9th Cir. 1980) (Similarly rejecting utility's attempt to condemn property owned by cooperative

financed by the Rural Electrification Administration).

City of Madison, 816 F.2d 1060.

Therefore, as demonstrated, and as recognized by the Fifth Circuit, federal jurisprudence is uniform in recognizing that a proposed state law based condemnation cannot stand under the supremacy clause of the Constitution of the United States when it allows a state-favored utility to "skim the cream" from a federally financed rural utility system thus harming and jeopardizing the remainder of such system.

II. THE COURT BELOW HAS NOT DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH A STATE COURT OF LAST RESORT.

The first section of Morgan City's argument in favor of its request for review of the Fifth Circuit's decision hinges upon Morgan City's assertion that the decision conflicts with state court decisions. Although Morgan City discusses, very briefly, two state court decisions, only one of the decisions emanates from a state's high court and, in fact, neither of the two cases are in conflict with the decision of the Fifth Circuit herein and other consistent federal jurisprudence.

In *Decatur County Rural Elec. Membership Corp. v. Public Serv. Co.*, 261 Ind. 128, 301 N.E.2d 191 (1973), the Indiana Supreme Court, in a situation somewhat similar to the present case, determined that once a rural area is included within a municipality of 1500 or more, it falls outside the ambit of the REAct, basing its decision on an

interpretation of 7 U.S.C. §§ 904 and 913. The strikingly obvious dissimilarity between *Decatur* and the present case is that the United States did not participate in the *Decatur* proceeding and did not object to the acquisition on preemption grounds. The record did not contain an administrative decision withholding approval of the proposed condemnation, nor did it contain a compiled factual record upon which the Court in *Decatur* could decide that the federal policies involved in the REAct would be frustrated by the particular taking proposed in that case.

It is absurd to suggest that once the United States has, pursuant to the REAct, provided loan funds and loan guarantees for the purpose of electrifying a rural area, that a for-profit municipal utility may waltz in, annex an area which has been developed on the strength of federal loan funds, and thereby frustrate the repayment of such federal loans and jeopardize the very viability of continued service to the remainder of such rural utility's system. This very situation has been recognized by the federal cases and was in fact recognized by Congress when it enacted 7 U.S.C. § 907. *Pend Orielle, supra; Big Bend, supra; City of Madison, supra.*

An attempt to take a portion of an REA financed cooperative's property cannot be viewed in isolation, but rather must be viewed with an eye toward how the taking affects the system as a whole and whether such effects represent a frustration of federal purpose. Unlike the instant case, in *Decatur* no such factual record was established on which a finding of frustration could be premised. *Decatur* is clearly distinguishable from and not in conflict with the instant case.

The second state court decision mentioned by Morgan City, an opinion of the Court of Appeals of Minnesota, *City of Rochester v. Peoples Co-op Power Assn., Inc.*, 505 N.W.2d 621 (Minn. App. 1993), is even more readily distinguishable from the instant decision. The City of Rochester court was faced with a preemption argument based upon a facial challenge to the state's condemnation law. Neither Peoples nor the United States presented a factual record specific to the effect of the proposed taking in asserting that the condemnation should be preempted. Instead, Peoples and the United States chose to rely upon the general argument that a municipal condemnation of an REA financed cooperative has the *potential* to interfere with the REA system. *Id.* at 625. Therein, the court, recognizing this Court's holding in *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 103 S.Ct. 1905, 76 L.Ed.2d 1 (1983), declined to fashion a per se rule prohibiting municipal condemnation of REA financed cooperative property.[3] The Court acknowledged that *Arkansas Electric* requires a fact specific finding of frustration of federal purpose in order to preempt a proposed taking, and noted that the United States had had three years to examine its interests in light of the proposed taking but had not done so in the context of that case. *City of Rochester*, 505 N.W.2d at 626. As *City of Rochester* was decided on a purely facial challenge to the proposed taking, it does not conflict with the instant decision which included review of a 28 page report prepared by the REA,

---

[3] This Court's holding in *Arkansas Elec.* and its relation to this case is discussed more fully, *ante*.

in addition to voluminous analyses prepared by independent consultants as to the effect of Morgan City's proposed actions on SLECA and Cajun.

Finally, the recently decided case entitled *City of Stillwell v. Ozarks Rural Elec. Coop. Corp.*, 870 F.Supp. 1025 (E.D. Okla. 1994) is paraded by Morgan City in an effort to suggest that the breadth of the Fifth Circuit's decision in this case is overreaching and should therefore be reviewed by this Court. *City of Stillwell, supra,* relied, in part, on the Fifth Circuit's decision herein in determining that a proposed municipal condemnation was preempted as it frustrated the federal purpose of the REAct. *Id.* at 1029. The REA administrator did not formally disapprove of the City's proposed condemnation. *Id.* at 1026. However, the Court was presented with a factual record in the proceeding upon which its decision was articulated. *Id.* at 1030-31.

Critically, it should be noted that *City of Stillwell* is a district court decision currently on appeal. Therefore, the opinion should bear no weight in this Court's determination of whether to grant a writ of certiorari herein, as it is not the regular province of this Court to allow factual determinations of a district court decision, which is not final and is currently in the appellate process in its own right, to dictate whether a request for review of another fact specific case should be granted.

The remainder of Morgan City's arguments, posed in the initial section of its Petition, including its erroneous statement that the Fifth Circuit's decision states a general rule of preemption, are properly addressed in the final section of Cajun's brief.

III. THE DECISION OF THE COURT OF APPEALS IS IN HARMONY WITH THIS COURT'S PREEMPTION DECISIONS.

The Fifth Circuit's analysis of preemption was guided by this Court's decision in *Hines v. Davidowitz, supra*. It recognized "that there is no litmus test for determining whether a particular application of state law would frustrate a federal purpose", citing *Davidowitz* as follows:

> This Court, in considering the validity of state laws in the light of . . . federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of th[e] particular case, [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).

31 F.3d at 323; A.8a.

Despite the Fifth Circuit's determination that *under the circumstances of this particular case* Louisiana's expropriation law stands as an obstacle to the full purposes and objectives of Congress, Morgan City argues that the decision is "wholly out of step" with two of this Court's holdings. Morgan City further suggests that the Fifth

Circuit has committed an error cautioned against in another decision of the Court. Morgan City's arguments are not persuasive and do not provide a basis for granting the writ of certiorari requested in this case.

The first of the alleged inconsistent decisions is *Arkansas Electric, supra.* In *Arkansas Electric,* the Arkansas Public Service Commission ("PSC") asserted jurisdiction over the wholesale rates of that state's G&T cooperative. The cooperative asserted, among other things, that the state PSC's jurisdiction over its rates was preempted by the REAct based on the pervasive involvement of the REA in relation to the management of the cooperatives and because the asserted jurisdiction might frustrate important federal interests. *Id.* at 385. The only issue germane to this proceeding is, of course, the frustration of federal interests discussion. As to that issue, this Court stated only:

> Moreover, even without an explicit statement from the REA, [as to preemption of a state regulatory agency's rate setting jurisdiction] a particular rate set by the Arkansas PSC may so seriously compromise important federal interests, including the ability of the AECC to repay its loans, as to be implicitly pre-empted by the Rural Electrification Act. See *Jones v. Rath Packing Co.,* 430 U.S., at 525-526, 540-543; cf. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 231-232 (1947). We will not, however, in this facial challenge to the PSC's mere assertion of jurisdiction, assume that such a hypothetical event is so likely to occur as to preclude the setting of any rates at all. *Exxon Corp. v. Governor of Maryland,*

> 437 U.S. 117, 130-131 (1978). See generally *Merrill Lynch, Pierce, Fenner & Smith v. Ware, Inc.*, 414 U.S. 117, 136-140 (1973).

Id. at 358. (Emphasis added.)

Clearly, *Arkansas Electric* recognized that it was premature to consider frustration of federal purpose prior to the setting of a rate by the state commission. In the present case, however, the proposed actions were clearly defined, particularly as to the extent of loss of cooperative revenues which would result if the expropriation were allowed to proceed. The Fifth Circuit recognized that REA's conclusion that the attempted piecemeal erosion would jeopardize the rural electrification program was amply supported by the record. Additionally, the Fifth Circuit found that the proposed condemnation represented an obstacle to the repayment of federal loans, to the financial viability of federally financed electric cooperatives, and ultimately to the maintenance of electric service to rural areas. 31 F.3d at 324; A.10a.

Morgan City also intimated that in *Arkansas Electric* this Court based its decision as to frustration of federal purpose on the fact that REA regulations anticipated state regulation of rates. Morgan City then cites 7 C.F.R. § 1710.12(b)(5), stating that "by regulation the REA must specifically consider the risks posed by municipal annexation of a borrower's service area in determining whether the loan is feasible." (Petition of Morgan City at p. 20) Morgan City's argument in this regard is misguided.

First, in *Arkansas Electric*, this Court, in discussing the fact that REA regulations anticipated state regulation of rates was dealing with the issue of field preemption and

not frustration of federal purpose. Second, the Court recognized that state action, even though anticipated, may so seriously impact the federal interest as to be impliedly preempted. Relying on 7 C.F.R. § 1710.12(b)(5), Morgan City argues that federal preemption should never be available to block a municipal expropriation, irregardless of the deleterious effect such a taking may have on federal programmatic interests. *Arkansas Electric* clearly does not stand for the proposition put forth by Morgan City.

Finally, in citing this Court to the C.F.R. dealing with loss of service territory by "annexantion", Morgan City has confused "annexation", which it accomplished in the present case by including a geographical area not previously in the city within its expanded boundaries thereby foreclosing SLECA from gaining any *new* customers in the annexed area, and "condemnation", by which Morgan City is attempting to take SLECA's existing customers and equipment in the newly annexed area. *Town of Coushatta v. Valley Electric Member. Corp.*, 130 So.2d 822 (La. App. 2d Cir. 1962), on rehearing. The Fifth Circuit's decision is not inconsistent but rather in step with *Arkansas Electric*.

The second of Morgan City's trilogy of "conflicting decisions" is *U. S. v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). In *Kimbell*, the Court was faced with determining whether contractual liens arising from SBA and FHA federal loan programs take precedence over private liens, absent a federal statute that sets priorities. The Court's effort was directed towards a determination of whether to adopt state law as federal common law in determining

the respective priorities or to fashion a nationwide federal rule in this area. Nowhere in the opinion is there a discussion of frustration of federal purpose preemption. Morgan City has done the very thing it is complaining of here. It has broadened the case's holding beyond any conceivable breadth it had when written, by stating that *Kimbell,* in effect, holds that there can be no frustration preemption found between a federal agency's programmatic interest and a state law. As stated in this Court's *Hines* opinion, the "primary function is to determine whether, *under the circumstances of th[e] particular case,* [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52 (1941). (Emphasis added.) The Fifth Circuit recognized, as did the Ninth Circuit in *Pend Orielle, supra,* that the proposed condemnation of a portion of a federally subsidized rural electrification system, even if compensated for under state law, would impair Congress's objective of providing reliable, low-cost electricity to rural America. After reviewing the circumstances of the present case, the Fifth Circuit then correctly determined that, "the proposed state-law condemnation would frustrate the federal purpose of providing low-cost reliable electric service to rural areas" and held that state law preempted. 31 F.3d at 324; A.11a. Thus, *Kimbell Foods* does not conflict with and is not even instructive as to the issues presented and decided in this proceeding.

The last "conflicting decision" of this Court which Morgan City asserts prophesied the error of the Fifth Circuit herein is *Pacific Gas & Elec. Co. v. State Energy Resources and Dev. Comm'n,* 461 U.S. 190 (1983). In fact,

Pacific Gas is cited extensively in the Fifth Circuit's opinion as instructive on the various methods of preemption. In *Pacific Gas,* the Court's concern was directed toward whether a California statute dealing with the economics of nuclear fuel storage was preempted by the Atomic Energy Act of 1954. Various methods of preemption were urged and subsequently discussed in the opinion. As to frustration preemption, this Court found that the Nuclear Regulatory Commission, while committed to the promotion of nuclear power and very active in the sphere of licensing and safety concerns, had left the states sufficient authority to allow regulation of the economic aspects of nuclear power. *Pacific Gas,* 461 U.S. at 222. In addition, it was noted that the Act's promotion of nuclear power plants did not include any express requirement that states construct or authorize nuclear power plants or prohibit the states from deciding, as an absolute or conditional matter, not to permit the construction of any further reactors. *Id.* at 204. Therefore, as this Court found that California's statute was economically based and that the purpose of the Federal Act did not include and was not frustrated by state economic regulation of nuclear power plants, no preemption was found.

In contrast, the present case presents a situation wherein a municipally-owned utility seeks to condemn, through a state law expropriation scheme, an economically profitable service area developed through federal financing. The state law, in determining whether condemnation should be allowed in a given case, does not account for or consider the potential prejudice to the remaining rural electricity consumers served by federally funded cooperatives. The result may very well be that the

proposed action leaves the REA financed cooperatives financially unable to continue service to the remaining low-density areas not targeted by municipally-owned or investor-owned utilities. This clearly counters the Congressionally declared purpose of the REAct to electrify the American farm. Therefore, while *Pacific Gas* is useful in delineating the methods of federal preemption under the supremacy clause, its fact specific holding as to frustration of federal purpose preemption in no way conflicts with the present decision.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted:

JOHN SCHWAB
WILLIAM E. HODGKINS*
JAMES L. ALCOCK, JR.
SCHWAB & WALTER
10636 Linkwood Court
Baton Rouge, LA 70810
Telephone: 504/767-1460

Attorneys for Respondent, Cajun Electric Power Cooperative, Inc.

*Counsel of Record

No. 94-2135

FILED
AUG 28 1995
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

CITY OF MORGAN CITY, PETITIONER

v.

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MARK B. STERN
THOMAS M. BONDY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals erred in holding that petitioner's attempted expropriation of property belonging to a federally financed rural electric cooperative was preempted by the Rural Electrification Act, 7 U.S.C. 901 *et seq.*

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	6
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Arkansas Elec. Coop. Corp. v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983)	5, 8
Boyle v. *United Technologies Corp.*, 487 U.S. 500 (1988)	12
City of Madison v. *Bear Creek Water Ass'n*, 816 F.2d 1057 (5th Cir. 1987)	5
City of Rochester v. *Peoples Coop. Power Ass'n*, 505 N.W.2d 621 (Minn. Ct. App. 1993)	10
Decatur County Rural Elec. Membership Corp. v. *Public Serv. Co.*, 301 N.E.2d 191 (Ind. 1973)	10
Fidelity Federal Savings & Loan Ass'n v. *De La Cuesta*, 458 U.S. 141 (1982)	9
Free v. *Bland*, 369 U.S. 663 (1962)	9
Freightliner Corp. v. *Myrick*, 115 S. Ct. 1483 (1995)	11
Gade v. *National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992)	9, 11
Hines v. *Davidowitz*, 312 U.S. 52 (1941)	4, 11
Jones v. *Rath Packing Co.*, 430 U.S. 519 (1977)	11
Michigan Canners & Freezers Ass'n v. *Agricultural Marketing & Bargaining Board*, 467 U.S. 461 (1984)	11
Pacific Gas & Elec. Co. v. *State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983)	11
Public Util. Dist. No. 1 of Franklin County v. *Big Bend Elec. Coop., Inc.*, 618 F.2d 601 (9th Cir. 1980)	5, 9

Cases—Continued: Page

Public Util. Dist. No. 1 of Pend Oreille County v. *United States*, 417 F.2d 200 (9th Cir. 1969) 5, 10
Volt Info. Sciences, Inc. v. *Board of Trustees*, 489 U.S. 468 (1989) 11

Statutes:

Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, Tit. II, § 232, 108 Stat. 3219 (codified at 7 U.S.C. 6942) 2-3
Rural Electrification Act, 7 U.S.C. 901 *et seq.* 2
7 U.S.C. 907 3

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-2135

CITY OF MORGAN CITY, PETITIONER

v.

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 31 F.3d 319. The supplemental opinion of the court of appeals denying rehearing (Pet. App. 24a-27a) and the opinion dissenting from the denial of rehearing en banc (Pet. App. 28a-34a) are reported at 49 F.3d 1074. The opinion of the district court (Pet. App. 12a-23a) is reported at 837 F. Supp. 194.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1994. A petition for rehearing was denied on April 3, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a municipality in Louisiana. In 1985, it annexed an adjacent area containing electric facilities belonging to and customers served by respondent South Louisiana Electric Cooperative Association (SLECA). SLECA is a rural power cooperative financed by the federal government under the Rural Electrification Act, 7 U.S.C. 901 *et seq.* After the annexation, petitioner, which operates its own municipal utility, offered to purchase all of SLECA's property in the annexed area, including facilities and the exclusive right to provide power. When SLECA refused the offer, petitioner brought this expropriation action in state court, seeking to condemn the property rights at issue. Respondent Cajun Electric Power Cooperative, Inc. (Cajun)—SLECA's wholesale power supplier and also a federally financed rural electric cooperative—intervened. The United States, which holds a security interest in SLECA's and Cajun's assets, was joined as a third-party defendant and removed the matter to federal court. Pet. App. 2a-3a.

2. The Administrator of the Rural Electrification Administration (REA)[1] subsequently filed into the

---

[1] Subsequent to the events in this case, the REA was redesignated as the Rural Utilities Service. See Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, Tit. II, § 232, 108 Stat.

record a signed declaration objecting to petitioner's state-law expropriation on the ground that it would cause substantial harm to the federal rural electrification program. The Administrator explained that the threatened expropriation would frustrate the federal program for three reasons. First, the annexed area is the most heavily populated part of SLECA's service territory and thus is the area SLECA is able to serve most economically and efficiently. Accordingly, loss of that area's customer load would increase the cost of power for SLECA's remaining customers. Second, this expropriation is not an isolated occurrence; it is part of a larger pattern of expropriations of SLECA service territory, the effects of which must be considered cumulatively. Third, the impact of the expropriation is not limited to SLECA; expropriations targeting SLECA affect SLECA's power supplier, Cajun, as well as the entire, interconnected chain of REA-financed cooperatives of which SLECA is but one part. Pet. App. 3a-4a.

Based on those concerns, the United States, joined by SLECA and Cajun, filed a motion to dismiss or in the alternative for summary judgment, arguing that the proposed expropriation was preempted by the Rural Electrification Act. The district court granted summary judgment. In the district court's view, the Administrator of the REA was authorized by 7 U.S.C. 907 to withhold approval of the expropriation, and the Administrator's assessment that the expropriation would be contrary to the federal rural electrification

---

3219 (codified at 7 U.S.C. 6942). Consistent with the decisions below, this brief will refer to the agency as the REA.

program was not arbitrary and capricious. Pet. App. 12a-23a.

3. A unanimous panel of the court of appeals affirmed. The court "save[d] for another day the issue of whether 7 U.S.C. § 907 by its terms confers authority on the Administrator to withhold approval of an involuntary disposition, and instead consider[ed] only whether a conflict [between state and federal law] exists because the proposed state-law expropriation would frustrate a federal purpose." Pet. App. 5a. See also *id.* at 8a ("Our primary function is to determine whether, under the circumstances of th[e] particular case, [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.") (quoting *Hines* v. *Davidwitz*, 312 U.S. 52, 67 (1941)). Examining the record compiled in the instant case, the court of appeals held that petitioner's attempted state-law expropriation was preempted because it would frustrate the purposes of the rural electrification program. The court explained:

> Even if fair value is paid for the lost facilities, [the expropriation] would inevitably have an adverse effect on the remaining customers * * * in the form of lost economies of scale and resulting higher per-user costs. To allow expanding municipalities to "skim the cream" by annexing and condemning those parts of a [rural power cooperative] with the highest population density (and thus the lowest per-user cost) would undermine Congress's purpose of facilitating inexpensive [power] supplies for farmers and other rural residents and protecting [cooperatives'] ability to repay their [REA] debts.

Pet. App. 9a (quoting *City of Madison* v. *Bear Creek Water Ass'n*, 816 F.2d 1057, 1060 (5th Cir. 1987)).

The court of appeals also placed substantial reliance on two decisions of the Ninth Circuit. Pet. App. 8a-10a (citing *Public Util. Dist. No. 1 of Franklin County* v. *Big Bend Elec. Coop., Inc.*, 618 F.2d 601 (1980); *Public Util. Dist. No. 1 of Pend Oreille County* v. *United States*, 417 F.2d 200 (1969)). In each of those cases, the Ninth Circuit had held a municipal condemnation of rural electric cooperative property preempted on the ground that it would frustrate the purposes of the rural electrification program. See *Big Bend*, 618 F.2d at 603 (holding that "under the Supremacy Clause of the Constitution a state municipal public utility could not condemn property owned by a federally subsidized public utility where the condemnation would interfere with the federal purpose of the Rural Electrification Act"); see also *Pend Oreille*, 417 F.2d at 201 ("This is not an ordinary case because what is sought to be taken here is part of a system and even if the part taken is paid for * * * a question remains as to the capacity of the remaining portions of the system to function."). The court of appeals stated in the instant case that it "f[ou]nd the Ninth Circuit's [decisions] helpful and persuasive." Pet. App. 8a.

4. Petitioner sought rehearing and rehearing en banc in the court of appeals. The panel issued a supplemental opinion explaining its denial of the petition for rehearing. Pet. App. 24a-27a. In particular, the panel rejected petitioner's reliance on *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983). *Arkansas Electric*, the panel explained, involved "a facial challenge to a

state's right to regulate a rural cooperative's wholesale electric rates." Pet. App. 25a. Here, by contrast,

> SLECA does not assert a facial challenge to a state's power to regulate or expropriate a rural cooperative's service area and equipment. Rather, SLECA challenges actual expropriations of its specific property and service rights. [Petitioner's] characterization of our decision as creating a "per se" rule of preemption is therefore mistaken. The panel's preemption analysis focussed on the actual effect of these specific expropriations, not whether the REAct facially preempts all attempts by states to expropriate the property of a rural cooperative.

Ibid. Three judges dissented from the denial of rehearing en banc (*id.* at 28a-34a), expressing the view that *Arkansas Electric* "is fatal to the panel's decision." Pet. App. 29a.

ARGUMENT

The decision of the court of appeals is correct and is not in conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. The court of appeals correctly concluded that petitioner's proposed state-law expropriation would undermine the Rural Electrification Act's core purpose of providing reliable, low-cost electricity to rural America. See Pet. App. 6a, 8a, 11a. SLECA's power system was constructed and developed with long-term, low-interest federal loans, the sole purpose of which was to foster rural electrification. Yet petitioner seeks to divert SLECA's facilities for its own, local purposes that are not concerned with rural

electrification. Moreover, the expropriation targets a particularly dense portion of the SLECA system, whose removal from the rest of the system would increase the cost of power for SLECA's remaining customers, who are the intended beneficiaries of the statute. See *id.* at 3a. In addition, SLECA does not exist in isolation; it is part of a substantial, interconnected network of rural cooperatives that provide power throughout rural Louisiana. Even if each individual expropriation is small in scope, a pattern of expropriations like the one in this case could have a significant cumulative effect on the well-being of the system as a whole. See *id.* at 3a-4a. The proposed expropriation would therefore "stand as an obstacle to the repayment of federal loans, to the financial viability of federally financed electricity cooperatives, and ultimately, to the maintenance of electricity service to rural areas." *Id.* at 10a (internal quotation marks omitted).

As the court of appeals noted, petitioner's selective expropriation of a designated portion of SLECA's electric system would "skim the cream" (Pet. App. 9a) from that system, thereby inflicting increased costs on rural consumers of electricity. Moreover, in combination with other, similar expropriations, petitioner's action threatens to effect a "piecemeal erosion" (*id.* at 10a; see *id.* at 27a) of the integrated rural power network to which SLECA belongs—a network that has been built and developed over a period of many years with massive federal funding. *Id.* at 2a n.2, 6a.[2] Under those circumstances, the

---

[2] Cajun, which provides power in bulk to SLECA and twelve other REA-financed rural distribution cooperatives

court of appeals correctly held that the expropriation would be antithetical to the interests of the rural electrification program.

2. a. Petitioner places substantial reliance (see Pet. 21) on *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983). Three judges on the court of appeals, dissenting from the court's denial of rehearing en banc, also regarded *Arkansas Electric* as "fatal to the panel's decision." Pet. App. 29a. In fact, *Arkansas Electric* is fully consistent with the court of appeals' resolution of the instant case.

The Court in *Arkansas Electric* rejected the contention that the Rural Electrification Act pre-empts *all* state regulation of rates charged by co-operatives financed by the REA. The Court explained that

> a particular rate set by the Arkansas [Public Service Commission] may so seriously compromise important federal interests, including the ability of [a cooperative] to repay its loans, as to be implicitly pre-empted by the Rural Electrification Act. We will not, however, in this facial challenge to the [Public Service Commission's] mere assertion of jurisdiction, assume that such a hypothetical event is so likely to occur as to preclude the setting of any rates at all.

461 U.S. at 389 (citations omitted). In the instant case, by contrast, "[t]he panel's preemption analysis focussed on the actual effect of these specific expropriations, not whether the REAct facially preempts

---

throughout Louisiana, has obtained approximately $3 billion in REA loans and loan guaranties. See Pet. App. 2a n.2.

all attempts by states to expropriate the property of a rural cooperative." Pet. App. 25a. *Arkansas Electric* did not hold or suggest that the Rural Electrification Act could never preempt state utility regulation; to the contrary, it expressly recognized the possibility that the deleterious effects of state regulation on the functioning of federally financed cooperatives could constitute an appropriate basis for finding such regulation to be preempted.[3]

b. Petitioner concedes that there is no conflict among the circuits on the question presented here. Indeed, other than the Fifth Circuit's decision in this case, only the Ninth Circuit has addressed questions concerning preemption of municipal condemnation of rural electric cooperative property. As the court of appeals noted in the instant case (Pet. App. 8a-10a), the Ninth Circuit has twice held such a condemnation preempted, based on a determination in each case that the condemnation at issue would frustrate the purposes of the federal rural electrification program. *Pub. Util. Dist. No. 1 of Franklin County* v. *Big Bend Elec. Coop., Inc.*, 618 F.2d 601 (9th Cir. 1980);

---

[3] As *Arkansas Electric* demonstrates as well, the fact that this case involves utilities, a subject assertedly of heightened state and local concern, also does not foreclose preemption. Cf. Pet. 18. It is well established that otherwise applicable preemption principles are not rendered "inapplicable * * * simply because [the matter] is [said to be] of special concern to the States: 'The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.'" *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Free* v. *Bland*, 369 U.S. 663, 666 (1962)). See also *Gade* v. *National Solid Wastes Management Ass'n*, 505 U.S. 88, 108 (1992).

Publ. Util. Dist. No. 1 of Pend Oreille County v. *United States*, 417 F.2d 200 (9th Cir. 1969). The court of appeals in the instant case expressly relied upon the rationale of those Ninth Circuit precedents. See Pet. App. 8a ("We find the Ninth Circuit's [decisions] helpful and persuasive in answering the question before us.").

c. Finally, the state-court cases upon which petitioner relies are not in conflict with the decision below. See Pet. 14-15 (citing *Decatur County Rural Elec. Membership Corp.* v. *Pub. Serv. Co.*, 301 N.E.2d 191 (Ind. 1973); *City of Rochester* v. *Peoples Coop. Power Ass'n*, 505 N.W.2d 621 (Minn. Ct. App. 1993)). In *Decatur*, the United States did not participate in the litigation and did not object to the condemnation on preemption or any other grounds. In the instant case, by contrast, the court of appeals placed substantial reliance on the REA's conclusions regarding the potential deleterious effects of the proposed expropriation, in conjunction with other planned condemnations, on respondent SLECA's operations and on the implementation of the federal scheme. See Pet. App. 26a-27a. In *City of Rochester* as well, the parties had not proffered a showing that the condemnation at issue, if consummated, would frustrate the purposes of the rural electrification program. The court in *City of Rochester* expressly acknowledged that a condemnation that would seriously compromise federal interests under the Rural Electrification Act would be subject to preemption. *City of Rochester*, 505 N.W.2d at 626.

3. Petitioner chides the court of appeals for giving "a literal reading" (Pet. 16) to this Court's holding that state law is preempted where it "stands as an

obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). It is well established, however, that state law that interferes with the operation of a federal statute is preempted, and that this result "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Gade* v. *National Solid Wastes Management Ass'n*, 505 U.S. 88, 98, 105-107 (1992). Indeed, this Court has continued to employ the *Hines* formulation, with no indication that other than a "literal" application of that standard is appropriate. See, *e.g.*, *Freightliner Corp.* v. *Myrick*, 115 S. Ct. 1483, 1487 (1995); *Volt Info. Sciences, Inc.* v. *Board of Trustees*, 489 U.S. 468, 477 (1989); *Michigan Canners & Freezers Ass'n* v. *Agricultural Marketing & Bargaining Board*, 467 U.S. 461, 469 (1984); *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 203-204 (1983); *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 526 (1977).

As petitioner observes (see Pet. 22), this Court's more recent decisions treat the *Hines* formulation as a species of "conflict" preemption rather than as a separate preemption category. See, *e.g.*, *Freightliner*, 115 S. Ct. at 1487 ("We have found implied conflict pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'") (quoting *Hines*, 312 U.S. at 67; additional citation and internal quotation marks omitted). The crucial point, however—and one repeatedly reaffirmed by this Court—is that state law

may conflict with (and therefore be preempted by) a federal statute even where that statute contains no express preemption provision, and even where the State has not rendered compliance with federal law impossible.[4] Contrary to petitioner's suggestion (see Pet. 22-23), the court of appeals did not treat "frustration" as a category of preemption doctrine separate and distinct from "conflict" preemption. Rather, it framed the inquiry as "whether a conflict [between state and federal law] exists because the proposed state-law expropriation would frustrate a federal purpose." Pet. App. 5a. That mode of analysis is fully consistent with this Court's precedents.

4. Finally, there are no extraordinary circumstances warranting this Court's review in the absence of a conflict in authority. The infrequency of appellate litigation concerning this issue suggests that the question presented is not one of pressing importance. There is, in particular, no basis for petitioner's contention that the decision below "effectively creates a constitutional barrier to municipal expropriation of cooperative property." Pet. 13. To

---

[4] See also *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 507 (1988) (in areas of "uniquely federal interest," "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption"). The Court in *Boyle* held that application of state tort law to a product liability suit between private parties was preempted because the predictable effect of such suits was to raise the cost to the government of military equipment procured from private contractors. *Id.* at 511-512. The government's interest in obtaining repayment of REA loans likewise qualifies as a "uniquely federal interest," and a persuasive showing that state expropriations threaten that interest furnishes an entirely appropriate basis for preemption.

the contrary, the court of appeals made clear that its "preemption analysis focussed on the actual effect of these specific expropriations, not whether the REAct facially preempts all attempts by states to expropriate the property of a rural cooperative." Pet. App. 25a. To the extent that petitioner characterizes the court of appeals' decision as establishing a per se rule of preemption, petitioner is therefore in error. Insofar as petitioner takes issue with the court of appeals' application of the governing standard to the record in this case, that fact-bound claim does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
MARK B. STERN
THOMAS M. BONDY
Attorneys

AUGUST 1995

Supreme Court, U.S.
FILED
AUG 24 1995
CLERK

No. 94-2135

(5)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CITY OF MORGAN CITY,
Petitioner,
v.
SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, CAJUN ELECTRIC POWER COOPERATIVE, INC., and THE UNITED STATES OF AMERICA, through the RURAL UTILITIES SERVICE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF AMICUS CURIAE OF THE LOUISIANA ENERGY AND POWER AUTHORITY IN SUPPORT OF THE PETITION

MILTON J. GROSSMAN
1730 K Street, N.W.
Suite 1000
Washington, D.C. 20006
(202) 347-7002
Attorney for Amicus Curiae Louisiana Energy and Power Authority

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

10 pp

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE	2
ARGUMENT	2
CONCLUSION	7

TABLE OF AUTHORITIES

Cases Page

Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 377 (1983) 6

Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 206 (1983) 6

United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) 7

Statutes

La. Rev. Stat. 19:101 *et seq.* 3

La. Rev. Stat. 33:4545-1 through 4545-37 2

La. Rev. Stat. 45:123 6

Rural Electrification Act, 7 U.S.C. § 904 5

Rural Electrification Act, 7 U.S.C. § 913 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-2135

CITY OF MORGAN CITY,

Petitioner,

v.

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, CAJUN ELECTRIC POWER COOPERATIVE, INC., and THE UNITED STATES OF AMERICA, through the RURAL UTILITIES SERVICE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF AMICUS CURIAE OF THE LOUISIANA ENERGY AND POWER AUTHORITY IN SUPPORT OF THE PETITION

Louisiana Energy and Power Authority, by its authorized legal representative, submits this brief amicus curiae in support of the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit filed by the City of Morgan City, Louisiana, on June 28, 1995.

The Court has extended the time for the United States to file its response until August 30, 1995.

The Louisiana Energy and Power Authority, ("LEPA") is a political subdivision of the State of Louisiana which was created by the Louisiana Legislature in 1979. La. Rev. Stat. 33:4545-1 through 4545-37. Under Rule 37.5 of the Rules of the Supreme Court, it is not necessary for LEPA to seek the consent of the parties to the filing of this brief.

INTEREST OF THE AMICUS CURIAE

LEPA's basic mandate is to provide bulk power supply to its member municipalities which own and operate their own retail electric distribution systems. At present, nineteen Louisiana municipal systems (including Morgan City) are members of LEPA, and most of these systems rely entirely upon LEPA for their bulk power supply. LEPA has an interest in this proceeding because the Fifth Circuit's decision will artificially constrain the size of its system and thereby impair its ability to take advantage of available economies of scale. In addition, LEPA believes that its status as a creature of the Louisiana Legislature may give it unique perspective on the state policies which affect the provision of retail electric service in Louisiana.

ARGUMENT

The three judges dissenting from the denial of rehearing have provided the sharpest statement of the basic reason why the decision below warrants review: In the delicate and complex balance of federal and state interests the decision below represents "a breathtaking federal power grab by REA from local government units. . ." (Petition 28a).

LEPA believes that the decision below would drastically impair state power to regulate the provision of retail electric service in two fundamental respects: (1) the decision represents an effective ban on the exercise of

the eminent domain power against an unwilling rural electric cooperative and (2) the panel's "frustration of purpose" rationale would logically extend to the preemption of many other traditional exercises of state power in the regulation of retail electric service.

1. As the state agency responsible for assuring that municipal electric systems in Louisiana have access to an economical bulk power supply, LEPA has seen how critically important the eminent domain process is to the continuing viability of municipal electric service.

In Louisiana the municipality is not an arbitrary geographic unit of government. Municipal governments exist to serve people who are clustered together in urban communities. With population growth, urbanization has often spread outside the existing corporate boundaries of Louisiana municipalities. In these situations, Louisiana law enables a municipal government to expand its boundaries through annexation. Such an annexation process has taken place in the area which is the subject of this lawsuit; and the residents of the annexed area are now full-fledged participants in the civic life of Morgan City.

Louisiana has designed its eminent domain law, La. Rev. Stat. 19:101 *et seq.*, to work in concert with the annexation law so that the benefits and burdens of ongoing municipal programs can be shared by all citizens uniformly. If a city operates a municipal electric system, the Louisiana eminent domain law makes it possible for that system to serve all city residents. This is desirable for political as well as economic reasons. The operation of a municipal electric system is almost always the subject of intense political scrutiny and debate. It will be much more difficult for the political process to arrive at effective consensus about the kind of service to be provided if one substantial segment of the citizenry is excluded from any use of that service.

The Court of Appeals panel decision effectively mandates that the policies which Louisiana has adopted to

deal with the process of urban growth must give way to a federal purpose of protecting rural electric cooperatives from the economic harm which could result from an expropriation.

Contrary to the statement of the panel in denying rehearing (Petition, Appendix C, p. 25a), it seems clear that the panel has adopted a *per se* rule. In order to invoke a "frustration" preemption, the rural electric coop need do no more that show that (1) the municipal system proposes to take one of the more densely populated portions of the coop system and (2) there are likely to be future takings. When areas on the fringes of cities become urbanized, it is true—virtually as a matter of definition—that they are more densely populated than rural areas. The first condition to invoking preemption amounts to no condition at all.

It is similarly true that unless there is some unusual reason to expect that urban growth will come to a complete halt, any particular instance of annexation and expropriation is likely, at *some* later point, to be followed by another. Displaying a fundamental hostility to the Louisiana policy on urban growth, the Court of Appeals panel states: "Permitting Morgan City to condemn these 252 users would pave the way for piecemeal erosion of other high-density service areas adjacent to Morgan City and other cities." (Petition, Appendix A, p. 10a). It is one thing to evaluate all scheduled expropriations together to determine their likely impact on the coop. But it is quite another thing to treat a minor loss of revenue as significant because it is likely to be followed at some undetermined later point by another revenue loss. Under the Court of Appeals approach, neither the actual loss nor the putative future loss needs to be evaluated within the framework of the cooperative's offsetting load growth. Moreover, the Court of Appeals panel appears to employ a strong presumption that the Louisiana expropriation courts *will not* adequately compensate the coop for its

losses. A "frustration of purpose" standard that easily met fairly deserves to be called *per se*.*

2. The Court of Appeals' conclusion that the Louisiana law of eminent domain should be preempted because of the possible harm to the financial interests of a rural electric cooperative has further implications which warrant this Court's immediate attention. The structure of the retail electric utility industry in Louisiana, as in most states, has largely been shaped by state—rather than federal—policy decisions. Thus, it is the states which have determined in the first instance whether to provide for the organization of rural electric cooperatives (7 U.S.C. § 904); whether to assign the cooperatives and the other retail suppliers exclusive service territories or some more limited form of protection from competition; whether to regulate the maximum level of retail rates; whether to exercise control over acquisitions of bulk power supply in order to assure that least-cost strategies or desired conservation policies are pursued.

---

* It is notable that the two undisputed facts which the Court of Appeals found to be sufficient to justify summary judgment in REA's favor would not have been sufficient to satisfy the Government's suggested standard. The Government had argued that summary judgement was appropriate if the undisputed facts showed (1) that Morgan City proposed to take one of the denser portions of the SLECA system (2) that future expropriations from SLECA are likely; and (3) that Cajun, the wholesale power supplier, is in poor financial condition. Brief for the United States, filed Sept. 21, 1993, pp. 26-27. The Court of Appeals decision makes no reference to this third element.

The Government's approach had been suggested as a way around a serious procedural problem—that the district court had accorded the REA Administrator's ad hoc and one-sided "proceeding" the unwarranted benefit of an "arbitrary and capricious" review standard. Although the Court of Appeals panel stated that it was applying a summary judgment standard, there are clear indications that the panel continued to treat the Administrator's contentions about the likely effects of the expropriation as "findings" to which deference was due. (See Petition Appendix C, pp.26a-27a.)

If federal courts are to be in the business of determining on their own when state laws or regulations frustrate a federal purpose, it is obvious that the result will often depend on the definition: what is the federal purpose? In this case the Court of Appeals has found a purpose of all-encompassing generality. Congress "enacted the REAct for the purpose of ensuring that electric service would be provided to rural America." (Petition Appendix A, p. 6a) "Congress has declared the federal purpose to electrify the American farm." (*Id.* at 10a).

With such a purpose as its touchstone, a federal court would be obliged to strike down any state law or regulation which changed the *status quo* to the detriment of a distribution cooperative or its "generation and transmission cooperative" supplier. Suppose, for example, that the Louisiana legislature, finding that there needs to be more competition in retail electric sales, amended the existing Louisiana law against "utility switching" (La. Rev. Stat. 45:123) so as to permit free competition for the business of all retail customers, old or new. Rural electric cooperatives might well be able to make out a case that such a change in the law would have a particularly adverse effect upon them because they are the highest-cost suppliers. Under the Fifth Circuit's rationale, Louisiana would have frustrated a federal purpose.

The Fifth Circuit's reasoning strikes a fatal blow at the heart of the traditional state police powers which this Court, in both *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) and *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 206 (1983), was at great pains to preserve from overbroad preemption claims. The Fifth Circuit was led to this untenable ground by a combination of errors, any one of which would be important enough to warrant the attention of this court: 1) the failure to invoke the strong presumption against preemption; 2) the failure to recognize that

the Rural Electrification Act, 7 U.S.C. § 913, itself contains a clear direction that the general policy of promoting rural electrification must be accommodated with the process of urban development; 3) the failure to recognize that under *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), the interests of the federal government as a lender in subsidized loan programs are not entitled to broad protection from the normal operation of state law.

CONCLUSION

Morgan City's petition for writ of certiorari should be granted.

Respectfully submitted,

MILTON J. GROSSMAN
1730 K Street, N.W.
Suite 1000
Washington, D.C. 20006
(202) 347-7002
Attorney for Amicus Curiae
Louisiana Energy and
Power Authority

.OTION FILED
AUG 28 1995

No. 94-2135

In the

Supreme Court of the United States

August Term, 1995

CITY OF MORGAN CITY,
Petitioner,

v.

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, CAJUN ELECTRIC POWER COOPERATIVE, INC., and THE UNITED STATES OF AMERICA, through the RURAL UTILITIES SERVICE,
Respondents.

Motion to File Amicus Curiae Brief and Brief of Amicus Curiae the Municipal Electric Systems of Oklahoma, Inc. In Support of the City of Morgan City's Petition for Writ of Certiorari from the United States Court of Appeals for the Fifth Circuit.

Larry Dickerson, Esq.*
P.O. Box 400
Poteau, Oklahoma 74953
(918) 647-8606
Attorney for Amicus Curiae Municipal Electric Systems of Oklahoma, Inc.

*Counsel of Record

BEST AVAILABLE COPY

TABLE OF CONTENTS

MOTION TO FILE AMICUS BRIEF OVER OBJECTION OF OTHER PARTIES 1

AMICUS CURIAE BRIEF 4

INTRODUCTION 4

INTEREST OF AMICUS CURIAE 6

SUMMARY OF ARGUMENT 6

ARGUMENT AND AUTHORITY 7

PROPOSITION

REACT IS DESIGNED TO WORK WITH THE STATES' RIGHT TO EXPROPRIATE THE PROPERTY OF RURAL COOPERATIVES AND THE ALTERATION OF THIS POLICY CREATES AN UNFAIR TAX BURDEN AND INTERFERES WITH THE GROWTH OF MUNICIPALITIES 7

A. REAct Anticipates the Expropriation of Rural Electric Cooperative's Property and Customers 8

B. State Law Creating Rural Electric Cooperatives and Facilitating the Growth of Municipalities. 9

C. The Decision in *Morgan City* 11

CONCLUSION 16

CASES

Arkansas Elec. Co-op. Corp. v. Arkansas Public Service Com'n, 461 U.S. 375, 377 (1983) 8, 9

Branch Trucking Co. v. State, ex rel. Oklahoma Tax Com'n, Okla., 801 P.2d 686, 689 (1990) 10

City of Stilwell, Oklahoma v. Ozarks Rural Electric Cooperative Corporation, No. 95-7011 In the United States Court of Appeals for the Tenth Circuit 13

Public Utility Dist. No. 1 of Franklin County v. Big Bend Elec. Co-op., Inc., 618 F.2d 601, (9th Cir. 1980) 7

The City of Morgan City v. South Louisiana Electric Cooperative Association, Cajun Electric Power Cooperative, Inc., and the United States of America, Through the Rural Utilities Service, 31 F.3d 319 (5th Cir. 1995) 5

United States v. Kimbell Foods, Inc., 440 U.S. 715, 734 (1979)) 9

STATUTES and REGULATIONS

7 U.S.C. § 901 *et seq.* 7

7 U.S.C. § 904 *et seq.* 8

7 U.S.C. § 907 *et seq.* 8

7 C.F.R. § 1710.112(b)(5) 9

18 Okla.Stat. § 437 *et seq* 9

18 Okla.Stat. § 437.2(d) 9

18 Okla.Stat. § 437.2(k) 11

No.

In the

Supreme Court of the United States

August Term, 1995

CITY OF MORGAN CITY,
Petitioner,

v.

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, CAJUN ELECTRIC POWER COOPERATIVE, INC., and THE UNITED STATES OF AMERICA, through the RURAL UTILITIES SERVICE,
Respondents.

Motion to File Amicus Curiae Brief and Brief of Amicus Curiae the Municipal Electric Systems of Oklahoma, Inc. In Support of the City of Morgan City's Petition for Writ of Certiorari from the United States Court of Appeals for the Fifth Circuit.

MOTION TO FILE AMICUS BRIEF OVER OBJECTION OF OTHER PARTIES

Petitioner Municipal Electric Systems of Oklahoma ("MESO") moves the Court for leave to file an amicus curiae brief pursuant to Supreme Court Rule 37.2.

Consent to filing the amicus brief was granted by Amy J.

Mauser, Esq., Crowell & Moring, 1001 Pennsylvania Ave., N.W., Washington D.C., attorney for the City of Morgan City, and Drew S. Days, III, Esq., Solicitor General, Department of Justice, Room 5143, 10th & Constitution Ave., N.W., Washington, D.C. 20530. These consents are attached hereto in Appendix A.

Consent to filing the amicus brief was declined by James M. Funderburk, Esq., Duval, Funderburk, Sundbery & Lovell, 101 Wilson Avenue, P.O. Box 3017, Houman, LA 70361, attorney for the South Louisiana Electric Association and William E. Hodgkins, Esq., Schwab & Walter, 10636 Linkwood Court, Baton Rouge, LA 70910, attorney for the Cajun Electric Power Cooperative, Inc. These declines to consent are attached hereto in Appendix B.

MESO is an Oklahoma non-profit corporation established in 1971 to provide information and training for 61 municipal electric distribution systems in Oklahoma. MESO has been adversely affected by the decision in *Morgan City* because the United States District Court for the Eastern District of Oklahoma relied on the 5th Circuit's opinion to declare Oklahoma's

expropriation statute invalid. If *Morgan City* is affirmed, MESO members will be unfairly limited in their ability to grow, annex new areas and make improvements to their utility systems.

MESO respectfully asks the Court to grant MESO's Motion without the consent of all parties. This case is of great importance to MESO and the approximately 2000 municipal electric providers in the United States. If not reversed, the 5th Circuit's decision will interfere with municipalities' ability to provide service to their residents and will create a disparity of services to municipal residents.

The 5th Circuit Court of Appeals decision will create two separate classes of similarly situated electric customers inside municipal boundaries. One class is provided with electricity by the municipal electric system and is required to pay state and local taxes based on the kilowatt usage. The other class is the formerly rural residents, who are now municipal residents, but who still have rural electric service. These municipal residents do not have to pay taxes for their electrical service since the rural cooperatives are tax

exempt.

The classification is fundamentally unfair to the electric customers on municipal electric service. The rule allows the rural electric companies to "cherry pick" customers and compete unfairly with municipal electric systems.

MESO, for the reasons above and in its brief, respectfully requests that this Honorable Court allow MESO to file its amicus curiae brief in support of granting the City of Morgan City's petition for a writ of certiorari without the consent of all parties.

AMICUS CURIAE BRIEF

INTRODUCTION

Amicus Curiae the Municipal Electric Systems of Oklahoma, Inc. ("MESO"), submits this Motion and Brief in support of the City of Morgan City's Petition for Certiorari.

The Rural Electrification Act ("REAct") is designed to facilitate the provision of low cost electrical service to rural areas. REAct is intended to operate in conjunction with the state statutory schemes to provide rural consumers with low cost electricity.

In *The City of Morgan City*, reported at 31 F.3d 319 the 5th Circuit Court of Appeals decided a question of federal law previously undecided in this Court. In *Morgan City*, the Court of Appeals erroneously held that REAct preempts a municipalities' power to expropriate the assets and customers of a rural electric cooperative after the municipality has annexed the applicable service territory. The basis for the decision is that the municipality's expropriation of the property securing the REA loan to the cooperative will impair the REA's collateral and will endanger the financial stability and future operations of the cooperative.

The 5th Circuit's decision has created an unnecessary conflict between state and federal law. The decision substantially interferes with the states' rights and the rights of its citizens.

INTEREST OF AMICUS CURIAE

Amicus Curiae, the Municipal Electric Systems of Oklahoma, Inc. ("MESO"), is an Oklahoma non-profit corporation established in 1971 to provide information and training for 61 municipal electric distribution systems in Oklahoma. MESO has been adversely affected by the decision in *Morgan City* insofar as the United States District Court for the Eastern District of Oklahoma relied on the 5th Circuit's opinion to declare Oklahoma's expropriation statute invalid. If *Morgan City* is affirmed, MESO members will be unfairly limited in their ability to grow, annex new areas and make improvements to their utility systems.

SUMMARY OF ARGUMENT

Nothing in REAct shows an intent to preempt state laws providing for expropriation of a rural cooperative's property and customers. In fact, REAct specifically addresses and resolves any possible conflicts between a municipality's expropriation power and the REA's interest in preserving its collateral.

The *Morgan City* decision ignores REAct's built in

protections against impairment of collateral. It ignores the fact that Congress knew such expropriations would occur and expressly provided for them in REAct.

More important is *Morgan City's* creation of two classes of municipal electric customer -- those who pay taxes on electrical service and those who do not. This classification is fundamentally unfair. The tax paying municipal electric customers are required to pay for services used by the non-tax paying municipal customers.

ARGUMENT AND AUTHORITY

PROPOSITION

REACT IS DESIGNED TO WORK WITH THE STATES' RIGHT TO EXPROPRIATE THE PROPERTY OF RURAL COOPERATIVES AND THE ALTERATION OF THIS POLICY CREATES AN UNFAIR TAX BURDEN AND INTERFERES WITH THE GROWTH OF MUNICIPALITIES.

The Rural Electrification Act, 7 U.S.C. § 901 *et. seq.* ("REAct") facilitates the provision of low cost electricity to rural areas. *Public Utility Dist. No. 1 of Franklin County v. Big Bend Elec. Co-op., Inc.*, 618 F.2d 601, (9th Cir. 1980). It does so by

making low interest loans to electrical utilities existing under state law and providing low cost electricity to rural areas. 7 U.S.C. § 904.

A. REAct Anticipates the Expropriation of Rural Electric Cooperative's Property and Customers.

REAct loans are generally secured by the property of the cooperative. REAct protects the Rural Electrification Association's ("REA") security interest by providing that:

> No borrower of funds under sections 904 or 922 of this title shall, without the approval of the Secretary, sell or dispose of its property, rights, or franchises, acquired under the provisions of this chapter, until any loan obtained from the Rural Electrification Administration, including all interest and charges, shall have been repaid.

7 U.S.C. § 907.

REAct must operate within the state regulatory system[1] and

---

[1]The regulation of utilities is one of the most important functions traditionally associated with the police power of the states. *Arkansas Elec. Co-op. Corp. v. Arkansas Public Service Com'n*, 461 U.S. 375, 377 (1983). Thus, the legislative history of the Rural Electrification Act makes it abundantly clear that although the REA was expected to play a role in assisting the fledgling rural power cooperatives, it would do so within the

a federal lender must consider the possibility of adverse state action prior to making the loan. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 734 (1979). Specifically, REAct regulations provide that in considering loan feasibility, the REA must determine that the "[r]isks of loss of portions of the borrower's service territory from annexation or other causes will not substantially impair loan feasibility." 7 C.F.R. § 1710.112(b)(5) (1995).

B. State Law Creating Rural Electric Cooperatives and Facilitating the Growth of Municipalities.

Oklahoma, like most states, has enabling legislation providing for the creation and regulation of rural electric cooperatives. *see* 18 Okla.Stat. § 437 *et seq.* The purpose of the Oklahoma Rural Electric Cooperative ("OREC") Act, is to provide electric service to "rural" Oklahoma. 18 Okla.Stat. § 437.2(d). "Rural area" is defined as an area of land located outside the limits of any Oklahoma municipality with a population of 1500 or more

---

constraints of existing state regulatory schemes. *Arkansas Elec. Co-op. Corp. v. Arkansas Public Service Com'n*, 461 U.S. at

persons.

To help keep rural electric rates low, Oklahoma cooperatives are tax exempt. Each cooperative annually pays a one dollar ($1.00) fee per one hundred persons, to the Oklahoma Tax Commission. Pursuant to the payment of this fee the cooperatives are exempt from all other excise and income taxes. *Branch Trucking Co. v. State, ex rel. Oklahoma Tax Com'n, Okla.*, 801 P.2d 686, 689 (1990). The cooperatives are also exempt from paying sales tax on the sale of electricity. Rural electric customers are exempt from payment of sales tax because, unlike their municipal counterparts, rural customers might be without any electric service. *Branch Trucking Co. v. State, ex rel. Oklahoma Tax Com'n, Okla.*, 801 P.2d at 691. On the other hand, public electric service providers are subject to all of the state and local taxes that are imposed on corporations within the state.

The OREC Act also recognizes that municipalities will often grow to encompass rural areas serviced by rural electric cooperatives. Thus, in order to keep "rural" cooperatives "rural",

the OREC Act provides that when a formerly rural area serviced by an electric cooperative becomes annexed by a municipality with its own electric service, the cooperative must turn over to the municipality its property and customers within the municipality's limits. 18 Okla.Stat. § 437.2(k). In exchange, the municipality must compensate the cooperative for the taking of its property.

C. The Decision in *Morgan City*

In *Morgan City* the 5th Circuit Court of Appeals held that when a municipality annexes a new area it cannot use its powers of eminent domain to acquire the property and customers of REAct funded electric cooperatives. The circuit court held that REAct preempted state law under the doctrine of frustration of purpose. The court explained that if municipalities were allowed to take the property and customers of REAct funded rural cooperatives it would impair the REA's collateral. The court believed that such a taking could seriously endanger the cooperative's ability to pay back the REAct loan and cause the cooperative to go out of business or have to raise its rates. The failure of the cooperative

would leave rural consumers without electricity. Raising rates would deprive the rural customers of low cost electric service. REAct's federal purpose would be frustrated because REAct's purpose is to insure that rural consumers have low cost electric service. Thus, reasoned the court, state laws permitting such takings are preempted by federal law.

The court's goal was protection of the REAct loans made to the rural electric cooperatives. The court found that if municipalities were allowed to use eminent domain proceedings to take the cooperative's property it would endanger the government's security and harm the cooperative's ability to repay the loan. The court's decision moves from a faulty premise to an erroneous conclusion. Congress anticipated and provided for the procedures necessary to protect REAct's loans. Initially, REAct regulations require the REA, in determining the sufficiency of the collateral, to consider "the risk of loss of portions of the cooperative's service territory from annexation or other causes." REAct clearly anticipated that once a rural area is annexed, the

cooperative would no longer provide service to that area. However, rather than prohibit the annexation, Congress opted for preventative measures by taking adequate steps in the beginning to make sure the collateral is adequate and will not become impaired. There is nothing to show that Congress intended to prohibit expropriations.

Additionally, REAct provides that the property securing the loans cannot be transferred without the consent of the REA. Thus, if the taking would seriously impair the REA's security interest the REA can refuse consent to the taking.[2]

---

[2] In *Morgan City* the REA objected to the expropriation. This may have been a proper grounds to hold that the expropriation could not be made. However, the 5th Circuit's decision went beyond those grounds for denying the expropriation by holding that such expropriations frustrate federal policy by impairing the collateral and the cooperative's ability to pay its loan. The decision is over-broad and has been relied upon to preempt and invalidate Oklahoma's expropriation statute. In *City of Stilwell, Oklahoma v. Ozarks Rural Electric Cooperative Corporation*, No. 95-7011 In the United States Court of Appeals for the Tenth Circuit, the district court relied on *Morgan City* to hold that the expropriation of Ozark's rural electrical property and customers was barred by the doctrine of frustration of purpose. However, unlike *Morgan City*, in *Stilwell*

When a municipality annexes a rural area the citizens within the annexation are benefitted by a plethora of municipal services previously unavailable to them. As municipal residents they receive municipal water, electric, sewer and trash service. They are protected by the municipal police and fire departments. They can take advantage of the municipality's recreational facilities. All of these services are funded in part by the revenues collected from the municipality's' sale of electricity.

The 5th Circuit's decision directly interferes with the states' power of eminent domain and their right to regulate the means and manner of providing their citizens with electricity. It impairs and impedes the growth of municipalities. The holding in Morgan City makes it undesirable for municipalities to expand and annex formerly rural areas. This deprives the citizens in the rural areas of an opportunity to have the advantages of municipal services, such

---

the REA found that its collateral would not be substantially impaired and, therefore, did not object to the expropriation. This broad brush application of *Morgan* is incorrect and this court should review *Morgan* and clarify the scope of the decision.

as water, sewer, trash police and fire protection and recreational facilities.

The Court of Appeals has expanded the scope of federal law far beyond its intended boundaries. While its intent was to enhance the federal laws regulating and protecting rural electric providers, the effect of the decision is to broaden the scope of REAct to include electric providers in municipal areas. The purpose of REAct is clearly violated by REAct funded electric cooperatives providing service in municipal areas.

Important interests of the states and the federal government are effected by the erroneous decision in *Morgan City*. These reasons, discussed in The City of Morgan City's Petition for a Writ of Certiorari, compel this Court to grant certiorari. In addition to the interests discussed by Morgan City, the amicus asks the Court to consider the substantial interference with the states' tax structure and the inequity and unfairness to municipal electric consumers.

The decision in *Morgan City* creates two classes of municipal electric consumers. On the one hand, is the municipal

consumer who pays taxes on their electric services. Then there is the formerly rural, now annexed, municipal consumer, who continues to get electricity from the rural cooperative. The annexed/municipal consumers do not pay any taxes for their electric utilities. This situation is fundamentally unfair considering that by paying taxes the municipal consumers are paying for the services and advantages provided to them by the municipality, while the annexed/municipal consumers, who do not pay taxes, receive the same services at a lower cost. This subsidation of the annexed/municipal consumers at the expense of the municipal consumers is fundamentally unfair and cannot be permitted.

CONCLUSION

REAct is designed to work with, not against, state laws governing rural electric cooperatives. The *Morgan City* decision places REAct and state law in direct conflict -- a state of affairs unintended by Congress when it enacted REAct. The decision in *Morgan City* directly interferes with the growth of municipalities and their ability to provide services to their citizens.

MESO respectfully asks this Court to grant Morgan City's Petition for Certiorari to review and reverse the decision.

Respectfully Submitted,

Larry Dickerson, Esq.
P.O. Box 400
Poteau, Oklahoma 74953
(918) 647-8606
Attorney for Municipal Electric Systems of Oklahoma, Inc.

APPENDIX A

LAW OFFICE OF
Larry Dickerson
1100 NORTH BROADWAY
P.O. BOX 400
POTEAU, OKLAHOMA 74953
(918) 647-8606

LARRY DICKERSON

August 10, 1995

Clifton S. Elgarten, Esq.
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, DC 20004-2595

Drew S. Days, III, Esq.
Solicitor General
Department of Justice
Room 5143
10th & Constitution Ave, N.W.
Washington, DC 20530

James M. Funderburk, Esq.
Duval, Funderburk,
Sundbery & Lovell
101 Wilson Avenue
P. O. Box 3017
Houman, LA 70361

William E. Hodgkins, Esq.
Schwab & Walter
10636 Linkwood Court
Baton Rouge, LA 70910

RE: United States Supreme Court Case No. 9402135
City of Morgan City v. South Louisiana Electric Cooperative,et al.

Gentlemen:

Pursuant to Rule 37.2 of the rules of the Supreme Court, the Municipal Electric Systems of Oklahoma (MESO) requests your written consent to MESO'S participation as an amicus curiae in the referenced matter prior to the consideration of the petition for a writ of certiorari. MESO is a non-profit membership organization which represents municipal power authorities operating within the State of Oklahoma. The interests of the membership are affected by the present action. MESO intends to file a brief in support of the petition for a writ of certiorari of the City of Morgan City, such filing to be made on or about August 30, 1995.

We request that you indicate your consent to MESO participation as an amicus by signing and returning this correspondence to the undersigned at your earliest convenience.

Sincerely yours,

Larry Dickerson
Attorney At Law
P. O. Box 400
Poteau, OK 74953
(918) 647-8606

CONSENT TO AMICUS PARTICIPATION
OF THE MUNICIPAL ELECTRIC
SYSTEMS OF OKLAHOMA

Signature of Counsel

City of Morgan City
Name of Client Represented

3/19/95
Date

U. S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

August 17, 1995

Larry Dickerson, Esq.
Attorney at Law
Post Office Box 400
Poteau, Oklahoma 74953

Re: City of Morgan City v. South Louisiana Electric Cooperative, et al., No. 94-2135

Dear Mr. Dickerson:

As requested in your letter of August 10, 1995, I hereby consent to the filing of an amicus curiae brief on behalf of the Municipal Electric Systems of Oklahoma in the above-captioned case.

Sincerely,

Drew S. Days, III

Drew S. Days, III
Solicitor General

cc: William K. Suter, Esq.
Clerk
Supreme Court of the United States
Washington, D.C. 20543

APPENDIX B

LAW OFFICES
DUVAL, FUNDERBURK, SUNDBERY & LOVELL
(Registered Limited Liability Partnership)
JAMES M. FUNDERBURK
SIDNEY C. SUNDBERY
CLAYTON E. LOVELL
C. BERWICK DUVAL II
PATRICIA P. REEVES
101 WILSON AVENUE
P. O. BOX 3017
HOUMA, LOUISIANA 70361
CLAUDE B. DUVAL (1914-1996)
Area Code 504
Telephone 876-6410
Fax 851-1490

August 18, 1995

Mr. Larry Dickerson
P. O. Box 400
Poteau, Oklahoma 74953

RE: City of Morgan City v. South Louisiana Electric Cooperative Association, et al

U. S. Supreme Court Case No. 9402135

Dear Mr. Dickerson:

This is in reply to your letter of August 10, 1995. As you know, I represent South Louisiana Electric Cooperative Association. I am afraid that I must respectfully object to your request to file an amicus brief in support of the Writ of Certiorari of the City of Morgan City. As you know, Rule 37.2 of the Rules of the Supreme Court do not favor amicus briefs. Furthermore, the rules require that something new or different be called to the court's attention in the brief and you have not indicated what that could possibly be. Morgan City has filed a very excellent and thorough brief touching on all issues in this case and I cannot imagine what the City of Poteau, Oklahoma, can bring to this case that has not already been briefed.

With kind regards, I am

Sincerely yours,

JAMES M. FUNDERBURK

JMP/c

cc: Mr. Clifton S. Elgarten
Mr. Drew S. Days, III
Mr. William E. Hodgkins
Mr. Mike Guidry

Schwab & Walter
Attorneys at Law

John Schwab
Gerald L. Walter, Jr.

William E. Hodgkins
Anne Jordan Crochet
John F. Derenbecker
J. Lee Alcock, Jr.
Brent B. Buxill

10686 Linkwood Court
Baton Rouge, Louisiana 70810-2854
Telephone (504) 767-1460
Fax (504) 769-0010

August 16, 1995

Mr. Larry Dickerson
P. O. Box 400
Poteau, Oklahoma 74953

Re: City of Morgan City v. South Louisiana Electric Cooperative Association, et al
U. S. Supreme Court Case No. 9402135

Dear Mr. Dickerson:

I am writing this letter in response to your letter of August 10, 1995 requesting my consent, pursuant to Rule 37.2 of the Rules of the United States Supreme Court, to your filing an amicus curiae brief in the above referenced matter prior to consideration of the Petition for a Writ of Certiorari. Rule 37.2 of the Rules of the United States Supreme Court provides that an amicus curiae brief submitted prior to the consideration of the Petition for Writ of Certiorari must be submitted prior to the time for submittal of oppositions to the Petition for a Writ of Certiorari. Inasmuch as the time period for submission of oppositions to the Petition for a Writ of Certiorari filed by the City of Morgan City in the above referenced matter has passed, any amicus curiae brief filed on behalf of your client would be untimely under the Rules of the United States Supreme Court. In any event, I am not in a position to consent, on behalf of Cajun Electric Power Cooperative, Inc., to the filing of an amicus curiae brief by you on behalf of your client in connection with the above referenced matter.

If you have any questions regarding this matter, please do not hesitate to contact me.

Very truly yours,

SCHWAB & WALTER

William E. Hodgkins

WEH:sbr
cc: Mr. James M. Funderburk
Mr. Drew S. Days, III
Mr. Clifton S. Elgarten

AUG 25 1995

No. 94-2135

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CITY OF MORGAN CITY,
Petitioner,
v.

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, CAJUN ELECTRIC POWER COOPERATIVE, INC., and THE UNITED STATES OF AMERICA, through the RURAL UTILITIES SERVICE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE COLORADO ASSOCIATION OF MUNICIPAL UTILITIES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

DUDLEY P. SPILLER *
JOSEPH B. WILSON
GORSUCH KIRGIS L.L.C.
1401 17th Street, Suite 1100
P.O. Box 17180
Denver, Colorado 80217-0180
(303) 299-8900
Attorneys for Amicus Curiae
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-2135

CITY OF MORGAN CITY,

Petitioner,

v.

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, CAJUN ELECTRIC POWER COOPERATIVE, INC., and THE UNITED STATES OF AMERICA, through the RURAL UTILITIES SERVICE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 37 of the rules of this Court, amicus curiae Colorado Association of Municipal Utilities (CAMU) requests leave to file the accompanying Brief as amicus curiae in support of the Petition for a Writ of Certiorari. Counsel for Petitioner and for Respondent the United States of America have consented to the filing of this Brief; however, counsel for Respondents South

Louisiana Electric Cooperative Association and Cajun Electric Power Cooperative, Inc. have declined consent.

CAMU is a nonprofit membership association composed of municipally-owned electric systems and power authorities. The members of CAMU provide retail electric service to over 560,000 Colorado residents.

CAMU and its members have a substantial interest in the issues involving whether the Rural Electrification Act preempts state statutes which would otherwise allow municipal utilities to provide electric utility service to municipal residents in annexed areas previously served by Rural Electrification Act loan recipients. CAMU supports the issuance of a writ of certiorari, and through the accompanying Brief seeks to inform the Court of the importance of the issues raised by the Petitioner and the manner in which the federal purpose preemption principles adopted by the Fifth Circuit are being applied by the Federal District Court for the Eastern District of Oklahoma.

For the foregoing reasons, the Motion of CAMU to file the accompanying brief as amicus curiae in support of the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DUDLEY P. SPILLER *
JOSEPH B. WILSON
GORSUCH KIRGIS L.L.C.
1401 17th Street, Suite 1100
P.O. Box 17180
Denver, Colorado 80217-0180
(303) 299-8900
Attorneys for Amicus Curiae
* Counsel of Record

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-2135

CITY OF MORGAN CITY,

Petitioner,

v.

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, CAJUN ELECTRIC POWER COOPERATIVE, INC., and THE UNITED STATES OF AMERICA, through the RURAL UTILITIES SERVICE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF THE COLORADO ASSOCIATION OF MUNICIPAL UTILITIES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Amicus curiae Colorado Association of Municipal Utilities (CAMU) respectfully supports the issuance of a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, dated September 12, 1994, as supplemented by an opinion on rehearing, dated April 3, 1995.

INTEREST OF THE AMICUS CURIAE

CAMU is a non-profit membership organization composed of 29 municipal electric utilities and three municipally-owned power authorities operating within the State of Colorado. CAMU members supply retail electric power to over 560,000 citizens of Colorado. Each of the CAMU member municipalities provides electric service to areas which border upon the service territory of rural electric cooperatives. On information and belief, all of the rural electric cooperatives in Colorado have loans outstanding with Rural Utilities Service, the successor organization to the Rural Electrification Administration.

Occasionally CAMU members annex areas receiving electric service from rural electric cooperatives. The Colorado Constitution recognizes the right of a municipal utility to provide service to municipal residents. Accordingly, the Colorado General Assembly enacted specific statutes to address the situation of an annexation of rural electric cooperative service territory. Under these statutes, when such an annexation occurs the municipal utility may exercise its powers of eminent domain in order to replace the rural electric cooperative and become the exclusive provider of electric service in the annexed area. However, in order to exercise that option, the municipality must pay just compensation to the rural electric cooperative for its facilities, service rights and reintegration costs. These Colorado statutes, in providing a mechanism for the realignment of service territories, recognize the conjunctive rights of the municipality to provide utility service to its citizens and the municipal citizens' rights to take service from the utility they own.

Under the ruling of the Fifth Circuit, these statutes could be preempted and Colorado municipalities could lose their right under the Colorado Constitution to provide utility service to their citizens if a federal agency, the Rural Utilities Service, refuses to permit the condemnation.

Municipalities could lose this right even though they are paying just compensation to the rural electric cooperative. This result not only denies the municipal citizens access to lower-cost municipal utility service, but it also denies the municipal utility the ability to expand its service base as the municipality grows.

REASONS FOR ISSUING THE WRIT

CAMU respectfully suggests that the City of Morgan City has stated sufficient grounds for the issuance of a writ of certiorari. CAMU further suggests that review is desirable in light of the manner in which the Fifth Circuit's ruling has been applied by other federal courts.

In dissenting from the Fifth Circuit's denial of rehearing *en banc,* the dissenting circuit judges characterized the *City of Morgan City* decision as "a breathtaking federal power-grab by REA from local government units that otherwise enjoy broad eminent domain authority." 49 F.3d at 1076. The breadth of this "power-grab" is expanding beyond even what the dissenting circuit judges feared. A recent decision by the Federal District Court for the Eastern District of Oklahoma extended the federal purpose preemption doctrine relied upon by the Fifth Circuit to preempt a municipality's right to condemn the facilities of a rural electric cooperative *even when the Rural Utilities Service did not oppose the condemnation. City of Stilwell v. Ozarks Rural Elec. Coop. Corp.,* 870 F. Supp. 1025, 1026 (E.D.OK 1994), *appeal pending.* Now, under *City of Stilwell,* in addition to the Rural Utilities Service any rural electric cooperative with outstanding federal loans can thwart what previously had been characterized as a municipality's "broad eminent domain authority."

The broad federal purpose preemption ascribed to the Rural Electrification Act by the Fifth Circuit, if left intact, will jeopardize or eliminate long-standing state

and local prerogatives, including: a municipality's right to condemn rural electric cooperative facilities; a municipality's right to provide utility service to its residents; and the ability of states and local governments to redefine the service territory of retail public utilities.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

DUDLEY P. SPILLER *
JOSEPH B. WILSON
GORSUCH KIRGIS L.L.C.
1401 17th Street, Suite 1100
P.O. Box 17180
Denver, Colorado 80217-0180
(303) 299-8900
Attorneys for Amicus Curiae
* Counsel of Record

...ION FILED
AUG 30 ...

(8)

No. 94-2135

In the Supreme Court of the United States

OCTOBER TERM, 1995

CITY OF MORGAN CITY,

Petitioner,

v.

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, CAJUN ELECTRIC POWER COOPERATIVE, INC., AND THE UNITED STATES OF AMERICA, THROUGH THE RURAL UTILITIES SERVICE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN PUBLIC POWER ASSOCIATION, THE NATIONAL LEAGUE OF CITIES, AND THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS *AMICI CURIAE* SUPPORTING PETITIONER

CHARLES A. ROTHFELD
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0616

23pp

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-2135

CITY OF MORGAN CITY,

Petitioner,

v.

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, CAJUN ELECTRIC POWER COOPERATIVE, INC., AND THE UNITED STATES OF AMERICA, THROUGH THE RURAL UTILITIES SERVICE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN PUBLIC POWER ASSOCIATION, THE NATIONAL LEAGUE OF CITIES, AND THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS *AMICI CURIAE* SUPPORTING PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief in support of petitioner. Petitioner and respondent United States of America have consented to the filing of the brief; respondents South Louisiana Electric Cooperative Association and Cajun Electric Power Cooperative, Inc., have denied consent.

Amicus American Public Power Association ("APPA") is a nonprofit service organization incorporated under the laws of the District of Columbia since 1940. APPA represents more than 1750 of the 2000 publicly owned electric utilities in the United States. This proceeding is of great interest to APPA and its members. Most public power systems service small to medium size cities that may grow and seek to annex adjacent territories as population, political considerations, and economic considerations warrant. Yet those cities and towns frequently are surrounded by or adjacent to areas served by cooperatives that have received loans or loan guarantees from the Rural Utilities Service ("RUS"), formerly known as the Rural Electrification Administration ("REA"). APPA members therefore are concerned that the decision below, if not reviewed by this Court, will preclude them from providing service to customers who are brought into the corporate limits of their communities through natural annexation processes.

Amicus National League of Cities ("NLC") is a nonprofit corporation that was organized in 1924 to assist municipalities in performing their functions. Nearly 17,000 municipalities are members of and participate in activities of the NLC. The members of the NLC have a strong and active interest in legal issues affecting the powers and prerogatives of local governments, including issues that affect the ability of municipalities to define their boundaries according to state law and structure the provision of municipal services in ways that are politically and economically beneficial.

Amicus National Institute of Municipal Law Officers ("NIMLO") is a national nonprofit organization comprised of local government attorneys representing approximately 1500 cities, counties, and special municipal districts in the United States. NIMLO's members are responsible for advising their local governments on a wide range of matters, frequently including annexation, eminent domain, and the provision of

city services. Those issues of central importance to local governments are directly at issue in this case.

Amici have a compelling and continuing interest in the issue presented here: whether a municipality's exercise of eminent domain authority to condemn the property of a rural electric cooperative is preempted by the Rural Electrification Act, 7 U.S.C. 901 *et seq.* Because more than 2000 municipalities currently provide electric power to their residents, the exercise of municipal eminent domain authority against rural electric cooperatives occurs with great frequency. But the court of appeals announced what amounts to a categorical rule precluding the condemnation of the cooperatives' property. This holding will prevent municipalities from offering certain of their residents a desirable service in the form of low-cost electric power, will bar them from tapping new sources of revenue, and in many cases will make municipal annexations a practical impossibility. *Amici* therefore regard it as essential that the Court review the decision below.

Because the issue presented by this case is of exceptional importance to *amici* and their members, *amici* respectfully move for leave to file the attached brief in support of petitioner.

Respectfully submitted.

CHARLES A. ROTHFELD
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0616

AUGUST 1995

QUESTION PRESENTED

Whether a municipality's exercise of eminent domain authority to condemn the property of a rural electric cooperative, so that the municipality may provide utility service to all of its residents, is preempted by the Rural Electrification Act, 7 U.S.C. 901 *et seq.*

TABLE OF CONTENTS

Page

QUESTION PRESENTED . . . . . (i)

TABLE OF AUTHORITIES iii

SUMMARY OF ARGUMENT 1

ARGUMENT 2

CONCLUSION 15

TABLE OF AUTHORITIES

Cases	Pages
Arkansas Electric Cooperative Corp. v. *Arkansas Public Service Comm'n*, 461 U.S. 375 (1983)	2, 7, 8, 12-14
City of Rochester v. *Peoples Cooperative Power Ass'n, Inc.*, 505 N.W.2d 621 (Minn. App. 1993)	10, 11
Decatur County Rural Electric Membership Corp. v. *Public Service Co.*, 301 N.E.2d 191 (Ind. 1973)	9, 10
Hillsborough County v. *Automated Medical Laboratories*, 471 U.S. 707 (1985)	11
Louisiana Light & Power Co. v. *City of Thibodaux*, 360 U.S. 25 (1959)	3, 12
Madisonville Traction Co. v. *Saint Bernard Mining Co.*, 196 U.S. 239 (1905)	12
Maryland v. *Louisiana*, 451 U.S. 725 (1981)	11
New York State Conference of Blue Cross & Blue Shield Plans v. *Travelers Ins. Co.*, 115 S. Ct. 1671 (1995)	11, 12
Public Utility Dist. No. 1 of Franklin County v. *Big Bend Electric Coop., Inc.*, 618 F.2d 601 (9th Cir. 1980)	10
Public Utility Dist. No. 1 of Pend Oreille County v. *United States*, 417 U.S. 200 (9th Cir. 1969)	10

TABLE OF AUTHORITIES - Continued

Pages

Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)] 12

United States v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979) 7

Wabash Valley Power Ass'n v. *REA*, 903 F.2d 445 (7th Cir. 1990) 7, 8, 14

Statutes and Regulations

7 C.F.R. 1710.112(b)(5) 7

7 U.S.C. 901 2

7 U.S.C. 902 10

7 U.S.C. 902(a) 6

7 U.S.C. 913 . . . . . 6, 10

7 U.S.C. 1926(b) 8

Act of May 20, 1936, ch. 432, Title I, § 13, 49 Stat. 1367 9

Miscellaneous

80 Cong. Rec. 5315 (1936) 7

80 Cong. Rec. 5316 (1936) 13

Hearing on S. 3483 before the House Committee on Interstate and Foreign Commerce, 74th Cong., 2d Sess. (1936) 13

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-2135

CITY OF MORGAN CITY,

Petitioner,

v.

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, CAJUN ELECTRIC POWER COOPERATIVE, INC., AND THE UNITED STATES OF AMERICA, THROUGH THE RURAL UTILITIES SERVICE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN PUBLIC POWER ASSOCIATION, THE NATIONAL LEAGUE OF CITIES, AND THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS *AMICI CURIAE* SUPPORTING PETITIONER

INTEREST OF THE *AMICI CURIAE*

The interests of the *amici* are set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

The decision below is of enormous practical importance. There can be no doubt that the exercise of municipal

condemnation authority against rural electric cooperatives occurs with considerable frequency, and is a matter of great significance to the operation of municipal governments and utilities. The court of appeals, however, announced what amounts to a categorical rule precluding the exercise of that authority. Yet the court's rationale for its rule — its conclusion that financial pressures may be imposed on rural electric cooperatives by the condemnation of REA-financed facilities located in densely populated service areas annexed by the municipality — turns the policy of the Rural Electrification Act on its head: the point of the Act was to encourage rural electrification through the mechanism of federal loans, *not* by requiring high-density areas to subsidize rural users of electricity.

It therefore is unsurprising that the decision below conflicts with the holdings of state courts that have looked to the policy of the Act. That decision also is in plain tension with this Court's rulings on the scope of preemption. And it cannot be reconciled with the Court's holding in *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375 (1983), which rejected arguments identical to those endorsed by the court of appeals. Because the court of appeals' decision improperly transfers authority from Congress to the REA — and does so in an area of great importance to States and municipalities — this Court should grant review.

ARGUMENT

The court of appeals in this case addressed a question left open in *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375 (1983): whether a municipality's condemnation of the property of a rural electric cooperative is preempted by the Rural Electrification Act (the "REAct"), 7 U.S.C. 901 *et seq.* The court's answer to that question both worked a fundamental interference with the power of state and local governments, and established an

enormously important practical bar to municipal action. By holding that the REAct preempts the exercise of the State's eminent domain authority, the court below imposed an extraordinary limit on the State's most basic "sovereign prerogative." *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25, 28 (1959). The practical effect of this holding, moreover, will be to impede municipal governance by erecting a significant obstacle to essentially all municipal annexations that affect rural cooperatives. Given this effect, it comes as no surprise that the ruling below conflicts with the decisions of state courts, departs from the purposes of the REAct, and cannot be reconciled with this Court's holdings. "Because the panel opinion has given REA authority that Congress clearly denied it and that the Supreme Court * * * has also withheld" (Pet. App. 28a (Jones, J., dissenting)), review by this Court is imperative.

1. At the outset, the practical importance of the decision below cannot be overstated. As petitioner notes (at Pet. 3-5 & n.2), rural electric cooperatives serve *over 70%* of the land mass of the United States. At the same time, more than *2000* municipalities — more than 100 of which are in the Fifth Circuit and therefore are directly affected by the decision below — now provide electric power to their residents. As a consequence, the exercise of the municipal condemnation power against rural electric cooperatives occurs with considerable frequency and is a matter of great significance to sound municipal operations. Indeed, the National Rural Electric Cooperative Association itself acknowledges that at least 86 such condemnations took place during the period 1985-1989 (see Pet. 5), and there is no reason to believe that the number has grown smaller in the intervening years.

The decision below, however, announced what amounts to a categorical rule precluding the municipal exercise of eminent domain against rural electric cooperatives. While the court of appeals briefly adverted to the record in suggesting that it did not state a per se rule of preemption (see Pet. App.

10a, 26a-27a), the court did not ask whether the condemnation here *actually* would frustrate the purposes of the REAct. The court thus pointedly did *not* require a showing that the challenged municipal action would render SLECA (or any other cooperative) insolvent,[1] or would interfere with SLECA's repayment of federal loans; the court found it enough that the condemnation would reduce SLECA's revenues and operating margins. See Pet. App. 27a; see also *id.* at 10a (stating generality that condemnation "could well leave" cooperatives unable to service customers).[2] But that, of course, will be true of virtually *every* condemnation, meaning that the court of appeals has stated a rule of absolute preemption. The judges dissenting

---

[1] Indeed, Cajun recently entered bankruptcy proceedings for reasons entirely unrelated to the proposed condemnation at issue in this case. See Pet. App. 28a n.3.

[2] It should be noted that the REA report cited by the court of appeals (see Pet. App. 10a, 26a-27a) went no further in its factual findings. The report did not find that the condemnation would lead to SLECA's insolvency or would preclude it from repaying its loans. Instead, the REA's conclusions were phrased in terms of generalities: it asserted that, "[w]hile qualification is difficult," condemnation would "adversely affect SLECA's rates and financial health" (*id.* at 73a); that "the interests of REA and the federal taxpayer in maximizing recovery on outstanding loans [to Cajun] will be frustrated" (*id.* at 74a); and that this would "adversely affect remaining RE Act beneficiaries served by the system." *Ibid.* The same general conclusions could be made about literally *any* exercise of eminent domain authority against a cooperative. In addition, of course, "whether there is an actual conflict that 'frustrates the ability to repay REA-backed loans' raises a factual question. Yet no hearing or trial occurred here, despite conflicting affidavits of competent experts on both sides." Pet. App. 31a (Jones, J., dissenting) (footnote omitted). This confirms that the rule applied by the court of appeals is, in practice, a categorical one.

below therefore plainly were correct in noting that "most tellingly, if the condemnation of 252 customers, a mere one percent of those served by SLECA, 'frustrates' a federal purpose, then what exercise of eminent domain would not do so? The practical effect of the panel's decision is much broader than its self-deprecating language would suggest." Pet. App. 32a.

Equally as important, the decision below will have the practical effect of precluding most municipal annexations that affect rural electric cooperatives, even if the rule announced by the court of appeals somehow does leave room for the occasional condemnation to escape preemption. As petitioner explains (at Pet. 3-4), the opportunity to provide utility service to areas that are newly annexed by a municipality — and therefore to obtain new sources of revenue that might help finance other municipal services in the annexed area — typically is an important factor in the decision to annex. But if the legality of a condemnation must turn on an after-the-fact, case-by-case, and standardless determination by a federal judge, guided only by the vague exhortation that the condemnation not "jeopardize the federal rural electrification program" (Pet. App. 10a), it will be impossible for a municipality ever to know in advance whether it will be permitted to expand utility service to a newly annexed area. This will make municipal planning impossible, and will preclude prudent municipalities from ever implementing annexations that affect rural electric cooperatives. Arguing to the contrary, SLECA maintains (at Br. in Opp. 3) that the annexation here "had nothing whatsoever to do with the expropriation which followed many years later." As SLECA acknowledges (see *ibid.*), however, the condemnation followed years of unsuccessful negotiations between the utility and petitioner, which makes clear that the provision of utility service to the residents of the newly annexed area always was understood to be central to the annexation.

2. The court below nevertheless insisted that its rule was compelled by the policy of the REAct, maintaining that preemption is necessary because condemnation of an "economically profitable service area" might "leave federally funded cooperatives financially unable to continue service to the remaining low-density areas." Pet. App. 10a. As an initial matter, we note that it is difficult to see how this *ever* could be the case when condemnation must be accompanied by the payment of just compensation.[3] More fundamentally, however, the holding below turns the policy of the REAct neatly on its head. The point of the Act, of course, is to encourage "*rural* electrification and the furnishing of electric energy to persons in *rural* areas." 7 U.S.C. 902(a) (emphasis added). The Act by its very terms therefore is directed at areas of low population density that are "not included within the boundaries of any urban area, as defined by the Bureau of the Census." 7 U.S.C. 913.

Here, however, respondents and the court of appeals are challenging the condemnation precisely because it "skim[s] the cream" (SLECA Br. in Opp. 17) by affecting an area that is "densely populated" (Pet. App. 10a) — that is to say, an area that is *urban* in character. But the policy of the Act manifestly was not to require that high-density (and therefore more profitable) urban areas subsidize rural users of electricity through the forced inclusion of urban dwellers in rural cooperatives; instead, Congress authorized the REA to encourage rural electrification through the very different

---

[3] Cajun (at Br. in Opp. 13) maintains that it is unfair for a municipality to take an area "which has been developed on the strength of federal loan funds," while SLECA complains (at Br. in Opp. 5-7) that the compensation offered for the taking was inadequate. But the adequacy of the payment (which necessarily will provide compensation for value generated by the federal loans), which may be challenged in a state-court proceeding, has nothing whatever to do with the propriety of preemption.

device of making federal loans to rural electric cooperatives, with the understanding that the cooperatives generally would be subject to state law. See *Arkansas Electric Cooperative Corp.*, 461 U.S. at 386-387; *Wabash Valley Power Ass'n* v. *REA*, 903 F.2d 445, 454 (7th Cir. 1990), citing *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979).[4] And while the court below worried that the exercise of eminent domain authority could lead cooperatives to default on the repayment of their loans and hence to the collapse of the rural electric cooperative system, the dissenting judges below correctly explained that "'Congress's assumption when it created the Rural Electrification Act in 1936 seems to have been that the REA could protect itself [from this parade of horribles] by setting conditions on the extension of credit.'" Pet. App. 33a, quoting *Wabash Valley Power Ass'n*, 903 F.2d at 453 (bracketed material added by the court).

Indeed, this point is proven by the REA's own regulations, which direct that the agency, in evaluating loan feasibility, look to "[r]isks of loss of portions of the borrower's service territory from annexation or other causes." 7 C.F.R. 1710.112(b)(5). In this setting, where REA must take the possibility of annexation and condemnation into effect *before* issuing a loan, "the present published policy of the REA is wholly inconsistent with pre-emption." *Arkansas Electric Cooperative Corp.*, 461 U.S. at 376. The same

---

[4] During the debate on the REA, rural electric cooperatives generally were analogized to "other business organization[s]." 80 Cong. Rec. 5315 (1936) (Rep. Rayburn). See *id.* at 5314-5315 (Rep. Rayburn) ("I am of the opinion that the loans made on the sort of set-up which will be approved by the Rural Electrification Administration will in 95 percent of the cases pay out. Of course, there is no class of business in the world that is successful 100 percent, and in which there are not some losses."). There was no suggestion that cooperatives would be distinguished from other businesses by receiving an immunity from the effect of state law.

conclusion is suggested by Congress's decision to include express limits on municipal annexation authority in *other* statutes. See, *e.g.*, 7 U.S.C. 1926(b) (water association service area "shall not be curtailed or limited by the inclusion of the area served by such association within the boundaries of any municipal corporation"). Such language was pointedly *omitted* from the REAct.

The court of appeals' decision and the contentions of respondents thus have the perverse effect of exalting the federal agency's bureaucratic interest in collecting on its loans over the policy endorsed by Congress. As Judge Easterbrook wrote for the Seventh Circuit of a similar argument made by the REA:

> After all, the REA made its loans and guarantees on the assumption that state regulation would apply. * * * [This] may have led to an adjustment in the interest rate [demanded by the REA], which, in turn, increases the rates [the rural utility] charges. (If there was no adjustment, people at REA were asleep on the job.) When the risk materialized, the REA has demanded shelter of federal law *plus* the interest rate that reflected the risk created by state law. Nice cushion, if you can get it.

Wabash Valley Power Ass'n, 903 F.2d at 455 (emphasis in original). In this setting, it is hardly surprising that the REA has not "always welcomed state regulation of rural power cooperatives, or thought it was a good idea. But, of course, such expressions of opinion do not constitute sufficient grounds for pre-emption." *Arkansas Electric Cooperative Ass'n*, 461 U.S. at 386 n.10. "'Frustration of purpose' preemption should not be allowed drastically to expand a federal lending agency's authority where Congress expressly contemplated it would play by local regulatory rules." Pet. App. 34a (Jones, J., dissenting).

3. It also is unsurprising that the decision below is in clear conflict with the holdings of state courts that have looked to the policy of the REAct. Thus the Indiana Supreme Court explained that

> [i]t is only logical that once an area serviced by a[] [rural electric cooperative] is incorporated into a municipality already serviced by an electric utility, it loses its rural identity. The justification for the continued existence of the [rural electric cooperative] in such an area no longer exists — its objective having been accomplished. This result is not only reasonable, but is fully within the ambit of statutory purposes and goals.

Decatur County Rural Electric Membership Corp. v. *Public Service Co.*, 301 N.E.2d 191 (Ind. 1973). Upholding a municipal condemnation, the court accordingly concluded that

> [a]fter a reading of the Rural Electrification Act, we are unable to discern any clash between the State of Indiana and the United States. As we have stated, the purpose for a [rural electric cooperative's] existence expires when the area becomes "urbanized." Once an area, which was theretofore "rural," is included within a municipality of 1,500 or more and becomes urban, it clearly falls outside the ambit of the Rural Electrification Act. Therefore, Section 18A [a statute permitting condemnation of rural utility property] in no way contravenes the Supremacy Clause.

Ibid.[5]

---

[5] The court's reference to municipalities with a population of 1500 derives from the REAct's original definition of "rural area," which included areas outside the boundaries of any "city, village, or borough having a population in excess of fifteen hundred inhabitants." Act of May 20, 1936, ch. 432, Title I, § 13, 49 Stat. 1367. As noted above, the definition has since been revised to include "any area of the United States not included within the

Similarly, in *City of Rochester* v. *Peoples Cooperative Power Ass'n, Inc.*, 505 N.W.2d 621 (Minn. App. 1993), the Minnesota Court of Appeals explained that "[t]he stated purpose of the RE Act is to make loans 'for rural electrification and the furnishing of electric energy to persons in rural areas.'" *Id.* at 625, quoting 7 U.S.C. 902. As a consequence, "after the City annexed the [area at issue], such area became 'urban'; therefore any subsequent condemnation of the utility property in that area did not interfere with the purpose of the RE Act." *Ibid.* The Minnesota court thus expressly rejected both the reasoning of the district court in this case and the Ninth Circuit holdings that were relied upon by the court below. *Id.* at 625-626, citing *Public Utility Dist. No. 1 of Franklin County* v. *Big Bend Electric Coop., Inc.*, 618 F.2d 601 (9th Cir. 1980); *Public Utility Dist. No. 1 of Pend Oreille County* v. *United States*, 417 U.S. 200 (9th Cir. 1969).

These state-court decisions cannot be reconciled with the holding below. The state courts' premise — that the condemnation of utility property in an urban area necessarily is consistent with the purposes of the REAct — is flatly inconsistent with the court of appeals' conclusion that "high-density service areas" should subsidize the operations of rural electric cooperatives. Pet. App. 10a.[6] Review by this Court

---

boundaries of any urban area." 7 U.S.C. 913.

[6] Cajun (at Br. in Opp. 13) seeks to distinguish *Decatur County* on the ground that "the United States did not participate in the *Decatur* proceeding and did not object to the acquisition on preemption grounds," and that there was no "compiled factual record" bearing on preemption in that case. But the decision below did not turn on the participation of the United States in the case, and the *Decatur* court's rationale made a factual record there irrelevant. Cajun's factual distinction therefore is simply beside the point. Cajun also notes (at Br. in Opp. 14) the observation in *City*

to resolve the conflicting decisions of federal and state courts on the issue therefore is warranted.

4. The court of appeals' decision also is in plain tension with this Court's holdings. Petitioner demonstrates (at Pet. 17-18) that the court of appeals' approach cannot be reconciled with this Court's general preemption doctrine, and we will not repeat that argument here. The Court's most recent (and unanimous) preemption decision does bear emphasis, however. In *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 115 S. Ct. 1671, 1676 (1995), the Court explained that

> despite the variety of the[] opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. See *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981). Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation, see *Hillsborough County* v. *Automated Medical Laboratories*, 471 U.S. 707, 719 (1985), we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest

---

of Rochester that condemnation might be preempted if "such condemnation so seriously compromises the REA's interests * * * as to be implicitly preempted." 505 N.W.2d at 626. The court immediately went on to hold, however, that "[i]n the present case, the United States has not demonstrated that the City's condemnation of [the] utility rights will compromise the REA's interests to a greater degree than any other condemnation." *Ibid.* As we have explained, the same thing is true here: the court below did not ask for, and the REA did not provide, anything more than a conclusory assertion that the condemnation could interfere with federal interests.

purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)].

Respondents maintain that they make out such a "clear and manifest purpose" by offering a simple syllogism: condemnation may impose financial burdens on rural electric cooperatives; Congress wished to encourage such cooperatives; therefore condemnation is preempted. But the Court rejected an essentially identical argument in *Travelers* itself, where state law was challenged on the ground that it imposed financial burdens on (and therefore coerced particular actions by) certain ERISA plans. See 115 S. Ct. at 1675-1676. Noting that this argument has no logical stopping point, the Court found "not so much as a hint in ERISA's legislative history or anywhere else that Congress intended to squelch these state efforts." *Id.* at 1681. And if that was true in *Travelers* — notwithstanding ERISA's express and "clearly expansive" preemption provision (*id.* at 1677) — there surely should be no preemption in this case, where the federal statute contains *no* preemption provision at all, where the legislative history militates *against* preemption, and where, as petitioner observes (at Pet. 18), the challenged municipal action involves an exercise of the State's most fundamental sovereign power. See *Louisiana Power & Light Co.* v. *Thibodaux*, 360 U.S. 25, 28 (1959); *Madisonville Traction Co.* v. *Saint Bernard Mining Co.*, 196 U.S. 239, 257 (1905) (Holmes, J., dissenting).

5. Finally, as the dissenting judges below explained (see Pet. App. 29a-31a), the court of appeals simply took no account of this Court's decision in *Arkansas Electric Cooperative Corp.* Challenging state regulation of the rates of rural electric cooperatives, the REA argued there (as we imagine it will argue here) that state regulation could threaten both "'the security * * * afforded for payment of the [REA] loan'" and the REA's policy of having costs "'shared in a manner which, over the long run, benefits all by the creation of a sound, extensive rural electric system.'" 461 U.S. at

385, 386 (citation omitted). In rejecting those contentions, the Court pointed to two considerations. "First, the legislative history of the Rural Electrification Act makes abundantly clear that, although the REA was expected to play a role in assisting the fledgling rural power cooperatives in setting their rate structures, *it would do so within the constraints of existing state regulatory schemes.*" *Id.* at 386 (emphasis added), citing 80 Cong. Rec. 5316 (1936) (Rep. Lea); Hearing on S. 3483 before the House Committee on Interstate and Foreign Commerce, 74th Cong., 2d Sess. 30, 37, 51, 52 (1936). And "[s]econd, the present published policy of the REA is wholly inconsistent with pre-emption of state regulatory jurisdiction." *Id.* at 387.

These considerations confirm that preemption is inappropriate here as well. The arguments for preemption in *Arkansas Electric* were identical to those offered by the court of appeals in this case. See Pet. App. 10a. There is no reason to doubt that Congress expected rural electric cooperatives to operate "within the constraints" of state eminent domain law, just as they must function within the limits of state rate regulation; to the contrary, as Judge Jones observed below,

> [s]urely, if state rate regulation is permitted, though it contains the power to hobble a federally financed cooperative, then the eminent domain power — exercisable only on payment of just compensation — has not been overridden by statute or, even more vaguely, by a conclusional judicial stamp labelled "frustration of purpose."

Pet. App. 28a (footnote omitted). And as we have explained (at 7-8), the "published policy of the REA" makes clear that any burden imposed upon the cooperative by condemnation must be taken into account *before* the REA issues a loan, and not as part of an after-the-fact effort by the "federal lending

agency to get more than its due at the expense of local sovereignty." Pet. App. 32a.

In its opinion on rehearing, the court of appeals tried to explain away *Arkansas Electric Cooperative Corp.* by pointing to this Court's caveat that "a particular rate set by [the state utility commission] may so seriously compromise important federal interests, including the ability of the [rural electric cooperative] to repay its loans, as to be implicitly pre-empted by the Rural Electrification Act." 461 U.S. at 389. The court of appeals took this language to "confirm[]" that preemption is appropriate here. Pet. App. 25a. In fact, however, the Court's statement did no more than leave open a "possible exception[]" to the rule of nonpreemption. *Wabash Valley Power Ass'n*, 903 F.2d at 452. See Pet. App. 30a (Jones, J., dissenting) ("*Arkansas Electric* did not entirely foreclose the possibility that a particular rate may * * * be impliedly preempted"). However that possibility is resolved with regard to rate regulation, we doubt — given the requirement of just compensation — that preemption of an eminent domain proceeding *ever* could be appropriate under the Act on the theory that it worked a financial hardship on the rural cooperative. And as we have explained (at 3-4 & n.2), there are, in any event, no findings here demonstrating that condemnation actually would frustrate a federal purpose. If preemption nevertheless may be appropriate in a case such as this one, further review to clarify the controlling standards is essential.

6. In sum, as Judge Jones explained below, the decision in this case takes authority from Congress, the administrative rule-making process, and local authorities; it transfers that authority to "REA officials, without benefit of express statutory authority or regulation," and to "federal judges, who have the final, delphic say in what constitutes a 'frustration of purpose.'" Pet. App. 34a. Because this "breathtaking federal power-grab by REA" (*id.* at 28a) involves a seemingly limitless expansion of preemption

doctrine — and because it occurs in an area that is of immense practical importance to States and municipalities — review by this Court is in order.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES A. ROTHFELD
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0616

AUGUST 1995

(9)

Supreme Court, U.S.
FILED
AUG 30 1995
OFFICE OF THE CLERK

No. 94-2135

In The
Supreme Court of the United States
October Term, 1995

CITY OF MORGAN CITY,
Petitioner,
v.

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, CAJUN ELECTRIC POWER COOPERATIVE, INC., AND THE UNITED STATES OF AMERICA, THROUGH THE RURAL UTILITIES SERVICE,
Respondents.

On the Petition for a Writ of Certiorari to the United States Court Of Appeals for the Fifth Circuit

---

BRIEF *AMICUS CURIAE* OF THE MISSISSIPPI CITIES OF OXFORD, COLUMBUS, TUPELO, AND STARKVILLE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

T.H. Freeland, III
*T.H. Freeland, IV
FREELAND & FREELAND, LAWYERS
1013 Jackson Avenue
P. O. Box 269
Oxford, Mississippi 38655
(601) 234-3414
ATTORNEYS FOR AMICI,
*Counsel of Record

M.W. Snopes Printing Services, Inc. - (601) 234-1009- Jefferson, MS

17 pp

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE PETITION PRESENTS AN ISSUE OF IMPORTANCE TO THE MUNICIPALITIES WHO FILE THIS BRIEF	3
II. THE PETITION PRESENTS AN ISSUE OF NATIONAL IMPORTANCE INVOLVING FEDERAL-STATE RELATIONS	5
III. THE LOWER COURT'S FINDING OF FRUSTRATION PREEMPTION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT	8
CONCLUSION	13

TABLE OF AUTHORITIES

CASES

	Page
Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375 (1983)	2, 7-9, 12
FERC v. Mississippi, 456 U.S. 742 (1982)	9
Hines v. Davidowitz, 312 U.S. 52 (1941)	10-11
Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986)	11
Munn v. Illinois, 94 U.S. 113 (1877)	9
New England Power Co. v. New Hampshire, 455 U.S. 331 (1982)	9
Pacific Gas & Electric Co. v. State Energy Resources & Development Commission, 461 U.S. 190 (1983)	8-11
Rice v. Santa Fe Elevator Corp, 331 U.S. 218 (1947)	10

STATUTES AND RULES OF COURT

7 U.S.C. § 902	6
Miss. Code Ann. § 11-27-1 *et seq.*(1972)	4 n.2
Miss. Code Ann. § 21-27-23 (Supp. 1994)	4 n.2
Sup.Ct.Rule 37.5	1 n.1

REGULATIONS

7 C.F.R. § 1710.12(b)(5)	12

LEGISLATIVE HISTORY

H.Conf.Rep. No. 100-495, 100th Cong., 1st Sess. *at 512*, reprinted in 1987 U.S.C.C.A.N. 2313-1258.	13 n.3

80 Cong Rec 5316 (1936) (Rep. Lea); Hearing on S. 3483 before the House Committee on Interstate and Foreign Commerce, 74th Cong. 2d Sess., 30, 37, 51, 52 (1936). 8

GOVERNMENT PUBLICATIONS

Energy Information Administration, Department of Energy, *Financial Statistics of Major United States Publicly Owned Utilities (1992)* 4

OTHER AUTHORITY

National Rural Electric Cooperative Association and National Rural Utilities Cooperative Finance Corporation, *Final Report of the Territorial Integrity Committee (1990)* 5-6

Charles F. Phillips, Jr., *Regulation of Public Utilities: Theory and Practice (1988)* 6

In The

Supreme Court of the United States

October Term, 1995

No. 94-2135

CITY OF MORGAN CITY,

Petitioner,

v.

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, CAJUN ELECTRIC POWER COOPERATIVE, INC., AND THE UNITED STATES OF AMERICA, THROUGH THE RURAL UTILITIES SERVICE,

Respondents.

On the Petition for a Writ of Certiorari to the United States Court Of Appeals for the Fifth Circuit

---

BRIEF *AMICUS CURIAE* OF THE MISSISSIPPI CITIES OF OXFORD, COLUMBUS, TUPELO, AND STARKVILLE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This Brief *Amicus Curiae* is submitted by four municipalities, subdivisions of the State of Mississippi, the cities of Oxford, Columbus, Tupelo, and Starkville.[1] The

---

[1] As political subdivisions of the State of Mississippi, these Municipalities may file a brief *amicus curiae* without consent of the parties. Sup. Ct. R. 37.5.

municipalities respectfully support the petition of the City of Morgan City, Louisiana for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the decision of that court in *City of Morgan City v. South Louisiana Cooperative Association*, 31 F.3d 319 (5th Cir. 1994), *rehearing denied*, 49 F.3d 1074 (5th Cir. 1995).

INTEREST OF AMICUS CURIAE

Oxford, Columbus, Tupelo, and Starkville, Mississippi all operate municipal electric departments with which they provide electricity to their citizens. These cites are bounded by cooperatives financed by the Rural Electrification Association. In order to provide the same level of services to all of their citizens, these cities must be able to exercise the power of eminent domain against boundary cooperatives as new areas are annexed. The decision of the court below, in holding that such annexations are preempted because they "frustrate the purpose" of the Rural Electrification Act, would prevent these municipalities from providing electrical services to their citizens living in areas that happen to be served by REA-financed cooperatives.

SUMMARY OF ARGUMENT

The court below decided a federal question—whether the Rural Electrification Act ("REAct") preempts state law condemnation of REA financed utilities—in a manner that conflicts with the applicable decisions of this Court. In *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375 (1983), this Court rejected a similar plea for preemption by the Administrator of the REA for

preemption. Lacking any explicit support for preemption in statute or regulation, and in spite of almost sixty years of history that presumes the role of state regulation, the court below held that state condemnation so "frustrates the purpose" of the REAct that condemnation actions are preempted.

The issues presented in the decision of the court below have a nationwide impact. Service of newly annexed urban areas by municipalities was an issue in at least twenty-one states in the 1980s; if the rule announced by the Fifth Circuit were national in scope, extension of this service will be halted. The municipalities filing this brief, all Mississippi cities subject to the rule announced by the court below, will be unable to provide a full range of city services to their citizens. Because of the importance of this issue to the relations of federal and state government, and because of the nationwide scope of this problem, the Petition for Certiorari by the City of Morgan City should be granted.

ARGUMENT

I. THE PETITION PRESENTS AN ISSUE OF IMPORTANCE TO THE MUNICIPALITIES WHO FILE THIS BRIEF

This case involves an important issue of federal-state relations, preemption of state law, in a context of traditional state regulation—the regulation of electrical utilities and the state's exercise of eminent domain. The opinion of the court below holds that the state may not exercise eminent domain over an electrical cooperative because such exercise would "frustrate the purpose" of the Rural Electrification Act

(hereinafter "REAct"). *City of Morgan City v. South Louisiana Electrical Cooperative*, 49 F.3d 1074, 1075 (5th Cir. 1995); App. 26a.

The lower court based its holding that the federal power had preemptively occupied state condemnation actions on the slenderest of evidence. Nothing in the express language of the REAct justifies preemption. State exercise of eminent domain does not contravene any express provision or requirement of the REAct. The sole basis of the panel holding was that exercise of eminent domain would have a negative impact on the purposes of the act in providing electricity to rural customers and assuring the collection of REA loans.

Each of the *amici* operates a municipal or other government-owned electrical utility as one of the services afforded its citizens, as do 2017 other cities in the United States. *See* Energy Information Administration, Department of Energy, *Financial Statistics of Major United States Publicly Owned Utilities 1992* at 3 (1994) (number of municipal or other government-owned utility services). Each of these *amici* is bounded by an electrical cooperative financed by the REA. Historically, as these municipalities have grown, they have annexed new territory under state annexation laws and then condemned territories served by the cooperatives that bound them. While under state law, the municipalities have compensated the cooperatives for the condemnation,[2] for over

---

[2] *See* Miss. Code. Ann. § 21-27-23 (Supp. 1994) (authorizing exercise of eminent domain); Miss. Code Ann. § 11-27-1 *et seq.* (1972) (eminent domain statutes).

sixty years there was no suggestion that such a condemnation would be preempted by the REAct.

Under the rule announced by the court below, applicable to these municipalities because they are within the Fifth Circuit, these cities will no longer be able to provide the same range of services to all of their citizens. The provision of such services is a fundamental function of municipal government in Mississippi and elsewhere. With questionable logic and in contravention of the prior decisions of this Court, *see infra* at 8-13 (discussing the lower court's failure to follow prior decisions of this court), the Fifth Circuit has interfered with the ability of these municipalities to provide those services.

II. THE PETITION PRESENTS AN ISSUE OF NATIONAL IMPORTANCE INVOLVING FEDERAL-STATE RELATIONS

The issues presented by the petition for certiorari are nationwide in scope. National surveys of REA-financed cooperatives by the National Rural Utilities Cooperative Finance Corporation reported that, in the years 1985 through 1990, over one-hundred cooperatives in twenty-one states had territory condemned in connection with municipal annexations. National Rural Electric Cooperative Association and National Rural Utilities Cooperative Finance Corporation, *Final Report of the Territorial Integrity Committee* 3, 9-13 (1990) ("*N.R.E.C.A. Report*," attached as an addendum to the *amicus* brief of the National Rural Electric Cooperative Association ("N.R.E.C.A.") in the court below). In the period covered by

this survey, annexations occurred in each state within the Fifth Circuit. *Id.* at 9-13.

It is the annexations described in the N.R.E.C.A. report that led the dissenters below to note that the holding of preemption would surprise even the cooperatives who benefited from the ruling. *City of Morgan City*, 49 F.3d at 1079; App. 34a. The report acknowledges that condemnation of territory served by cooperatives had been a long-term issue, terming loss of territory "a serious problem in at least 17 states." *N.R.E.C.A. Report* at 5.

The problem is exacerbated by the efforts of REA-financed cooperatives to serve outside the areas that are their historic and statutory mandate. The purpose of the REAct is for "the furnishing of electrical energy to persons in rural areas who are not receiving central station service...." 7 U.S.C. § 902. By the late 1970's, 98% of this market was served, and REA loans increasingly were granted to finance expansion into urban areas and provide power for industrial users. Charles F. Phillips, Jr., *The Regulation of Public Utilities: Theory and Practice* 599 (1988). The effort by cooperatives to move into non-rural territory is also driven by pressures from the REA. In the court below, the *amicus* brief of the NRECA noted that

> a combination of factors, including industry-wide excess capacity, cost overruns for generation projects associated with rapidly rising interest rates, nuclear power problems, and proliferation of environmental and other rules and regulations, and a recession, all led to serious financial problems for many companies in the electric utility industry. The rural electric program was

> no exception. As a result, borrowers, such as Cajun, had to negotiate the restructuring of their REA debt. *Virtually every such restructuring, including Cajun's, relied on the borrower's meeting certain growth projections in order for REA to recover all of its monies.* Although municipal condemnations had always created problems for REA borrowers by taking away some of their highest potential growth areas, the advent of REA debt restructuring exacerbated the problems because, for borrowers like Cajun, loss of these areas would make it virtually impossible for the borrower to meet growth projections and thus for REA to recover its loan funds.
>
> -*Amicus* Brief of NRECA at 3-4 (emphasis added).

The force driving the effort by these cooperatives and the REA to seek a ruling of preemption does not emanate from any act of Congress or from any regulation promulgated by the REA; rather it is the economic pressures described by the cooperatives in the court below.

This Court's opinion in *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375 (1983), rejected a similar plea by the Administrator of the REA for preemption. In ruling that Arkansas rate regulation of a cooperative was not preempted, this Court stated that "the present published policy of the REA is wholly inconsistent with pre-emption of state regulatory jurisdiction." *Arkansas Electric*, 461 U.S. at 387. While stating that the REA's guidelines recognized the power of states to regulate rates for REA

financed cooperatives, this Court noted that REA officials had not always "welcomed state regulation or thought it a good idea," and held that "such expressions of opinion do not constitute sufficient grounds for pre-emption." *Id.* at 386 n. 10. This Court stated that the legislative history of the REAct expressly provided for state regulation:

> [T]he legislative history of the Rural Electrification Act makes abundantly clear that, although the REA was expected to play a role in assisting the fledgling rural cooperatives in setting their rate structures, it would do so within the constraints of existing state regulatory schemes. See, e.g. 80 Cong Rec 5316 (1936) (Rep. Lea); Hearing on S. 3483 before the House Committee on Interstate and Foreign Commerce, 74th Cong. 2d Sess., 30, 37, 51, 52 (1936).
>
> -*Id.* at 386-87.

The opinion of the court below allows cooperatives and the REA to move beyond the "constraints of existing state regulatory schemes" contemplated by the REAct.

III. THE LOWER COURT'S FINDING OF FRUSTRATION PREEMPTION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

The authority of the states to regulate electrical utilities has been repeatedly affirmed by this Court. *See Arkansas Electric Cooperative Corp.*, 461 U.S. at 377 (affirming power of state to regulate cooperatives governed by REAct); *Pacific Gas & Electric Co. v. State Energy Resources & Development Commission*, 461 U.S. 190, 193 (1983) (state bar of new

nuclear plants pending resolution of waste storage issue not preempted by federal policy of encouraging nuclear power). The authority of states to regulate utilities has been a central theme in this Court's preemption and commerce clause cases:

> Maintaining the proper balance between federal and state authority in the regulation of electric and other energy utilities has long been a serious challenge to both judicial and congressional wisdom. On the one hand, the regulation of utilities is one of the most important functions traditionally associated with the police power of the States. *See Munn v. Illinois*, 94 U.S. 113 (1877). On the other hand, the production and transmission of energy is an activity particularly likely to affect more than one State, and its effect on interstate commerce is often significant enough that uncontrolled regulation by the States can patently interfere with broader national interests. *See FERC v. Mississippi*, 456 U.S. 742, 755-57 (1982); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982).
>
> *-Arkansas Electric*, 461 U.S. at 377.

The state's role in regulating utilities persists even in areas of heightened federal concern such as nuclear power:

> Early on, it was decided that the States would continue their traditional role in the regulation of electricity production. The interrelationship of federal and state authority in the nuclear energy field has not been simple; the federal regulatory structure has been frequently amended to optimize the partnership.

-*Pacific Gas*, 461 U.S. at 194.

At issue in *Pacific Gas* was whether the Atomic Energy Act preempted a California act that "condition[ed] the construction of nuclear plants on findings by the State Energy Resources Conservation and Development Commission that adequate storage facilities and means of disposal are available for nuclear waste...." *Id.* at 194-95. This Court noted the traditional importance of the state role in regulation of generation of electricity:

> Thus, "Congress legislated here in a field which the States have traditionally occupied .... So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."
>
> -*Id.* at 206 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (alteration in original).

Most relevant to this case, this Court rejected the argument that the state statute frustrated the explicitly-stated Congressional purpose of encouraging nuclear power:

> Finally, it is strongly contended that § 25524.2 frustrates the Atomic Energy Act's purpose to develop the commercial use of nuclear power. It is well established that state law is pre-empted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 US at 67....
>
> There is little doubt that a primary

> purpose of the Atomic Energy Act was, and continues to be, the promotion of nuclear power. The Act itself states that it is a program "to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public." 42 USC § 2013(d).
>
> -*Pacific Gas*, 461 U.S. at 220-221 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

This Court concluded that, given the balance of federal-state authority established by Congress and the evidence of authority Congress left to the states, "it is for Congress to rethink the division of regulatory authority in light of its possible exercise by the States to undercut a federal objective. The courts should not assume the role which our system assigns to Congress." *Pacific Gas*, 461 U.S. at 222-23.

The opinion below falls prey to two analytical errors. In the first place, the lower court frames the purpose of the REAct in the broadest possible terms, allowing preemption to reach far more broadly than Congress would have anticipated. This Court has consistently refused to allow sweeping statements of Congressional purpose to serve as the basis to preempt state laws in areas traditionally left to state regulation. *See Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 370 (1986) (rejecting argument that Communications Act of 1934 preempted state regulation of intrastate telephone services that arguably "frustrat[ed] the ability of the FCC to perform its statutory function of ensuring efficient, nationwide phone

service"). In the second place, the lower court opinions show too great a willingness to accept the opinion of the administrator of the REA as to the purposes of the REAct and whether the proposed condemnation frustrates those purposes. *See supra* at 7 - 8 (discussing this Court's rejection in *Arkansas Electric* of the opinion of the REA administrator favoring preemption).

The REA is in no sense a regulator of utilities, it is "a lending agency rather than a classic public utility regulatory body...." *Arkansas Electric*, 461 U.S. at 386. It should also be recalled that the purpose of the act is to provide a federal subsidy to make rural electrification economically feasible. In taking the position that customers in high-density areas must subsidize those in rural areas, the REA ignores the actual purpose of the act, to provide federally-supported financing for electricity in rural areas. Further, in taking the position that its borrowers are shielded from state eminent domain procedures, even where the eminent domain procedure is shown to satisfy the REA security interest, the REA is reaching beyond its interest as a lender.

A reading of the REA's own regulations shows that the REA has not previously taken the view that municipal condemnations or annexations were preempted. In making loans, the REA was to evaluate "[r]isks of loss of portions of the borrower's service territory from annexation or other causes will not substantially impair loan feasibility." 7 C.F.R. § 1710.12 (b)(5). If the REAct preempts state law in the manner

advanced by the REA and the panel opinion, this regulation is nonsense.[3]

CONCLUSION

For the reasons and those set forth in the petition for certiorari of the City of Morgan City, the petition for certiorari should be granted.

Respectfully submitted,

T.H. Freeland, III
*T.H. Freeland, IV
FREELAND & FREELAND,
LAWYERS
1013 Jackson Avenue
P. O. Box 269
Oxford, Mississippi 38655
(601) 234-3414

ATTORNEYS FOR AMICI,
MISSISSIPPI CITIES OF OXFORD,
COLUMBUS, TUPELO and
STARKVILLE

*Counsel of Record

---

[3]There is legislative history that demonstrates that Congress understands that the Rural Electrification Act does not preempt state condemnations and annexations. In 1987, an attempt was made to require the REA administrator to approve acquisition of the property of a cooperative through annexation or condemnation. H.Conf.Rep. No. 100-495, 100th Cong., 1st Sess. at 512, *reprinted in* 1987 U.S.C.C.A.N. 2313-1258. While this bill passed the House, it did not pass the Senate and did not pass out of the conference. If the panel reading of the Rural Electrification Act is correct, this bill (like the REA regulations) would have been nonsense.